SUPREME COURT OF THE STATE OF WISCONSIN

BURBANK GREASE SERVICES, LLC,

Plaintiff-Appellant-Petitioner,

v.

Appeal No. 2004AP468

LARRY SOKOLOWSKI;
UNITED GREASE L.L.C.,
and UNITED LIQUID WASTE
RECYCLING, INC.,

Defendants-Respondents.

BRIEF OF PLAINTIFF-APPELLANT-PETITIONER, BURBANK GREASE SERVICES, LLC

Review of Court of Appeals District IV,
Appeal No. 2004AP468

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Should Wis. Stat. §134.90(6) be construed to preempt all common law causes of action for misappropriation of confidential information, even in the absence of a statutorily defined trade secret?

   Answered by the trial court: Yes

   Answered by the court of appeals: Yes

2. Is disclosure of confidential or proprietary data a disclosure of "restricted access information" pursuant to Wis. Stat. §943.70(2)(a)6?

   Answered by the trial court: Not specifically addressed.

   Answered by the court of appeals: No

STATEMENT OF THE CASE

In 1986, the Wisconsin legislature passed 1985 Act 236, which is more commonly known as the Uniform Trade Secrets Act. Wis. Stats. §134.90. In the Prefatory Note of 1985 Act 236, the legislature indicated the intent of the Act was to codify the basic principles of common law trade secret protection to keep them distinct from patent law and to unify the remedies for trade secret misappropriation. 1985 Act 236, Prefatory Note. The Act specifically provided that it displaced "conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret," except contractual remedies and "any civil remedy not based upon misappropriation of a trade secret." Wis. Stats. §134.90(6). Since the enactment of this statute, no Wisconsin Court has squarely addressed which claims may be preempted by Wis. Stats. §134.90(6).

In business, the term "confidential information" encompasses a broad spectrum of information for which a business may seek protection from disclosure. Within the realm of that information considered to be confidential are

trade secrets, a special subset of confidential information for which the law has afforded greater protection. *See IDX Systems Corp. v. Epic Systems Corp.*, 285 F.3d 581, 583 (7th Cir. 2002) (Trade secrets are a subset of all commercially valuable information.). In Wisconsin, a "trade secret" is specifically defined in Wis. Stats. §134.90(1)(c). The term "trade secret" is then used throughout Wis. Stats. §134.90, including in Wis. Stats. §134.90(6), the preemption provision. In this case, however, both the trial court and the Court of Appeals did not consistently apply the definition of "trade secret" when applying the law to the facts of this case. The lower courts used the statutory and more narrow definition of a "trade secret" to find that the petitioner had no protectable trade secrets, but then used a different and much more expansive definition of "trade secret" to bar any other claims petitioner may have had.

The Petitioner, Burbank Grease Services, LLC (hereinafter "Burbank")[1], is engaged in the business of

[1] As of December 27, 2004, Burbank Grease Services, LLC, is now known as Anamax Grease Services, Inc.

collection and processing of used restaurant, industrial, and trap fry grease. (R.2:2, A-Ap.168.) Burbank employed Respondent, Larry Sokolowski (hereinafter "Sokolowski"), in managerial positions between November of 1997 and April of 2001, including Director of Operations and Procurement/Territory Manager. (R.38, A-Ap.242.)

Upon resigning from Burbank, Sokolowski went to work for Respondent, United Liquid Waste Recycling, Inc. (hereinafter "United Liquid Waste"). (R.38, A-Ap.240.) Shortly after joining United Liquid Waste, Sokolowski, along with the shareholders and officers of United Liquid Waste, formed United Grease L.L.C. (hereinafter "United Grease"). (R.38, A-Ap.240.) United Grease began directly competing with Burbank by collecting and processing used fry grease.

At the time of Sokolowski's departure from Burbank, he had in his possession more than a mere copy of Burbank's Christmas card list. He had a substantial amount of Burbank's confidential information. Specifically, Sokolowski had Burbank's customer list, which included customer name, address, phone number, contact person,

type of service, size of grease trap and price charged by Burbank. (R.38, A-Ap. 260; R.6, A-Ap.277-78.)

In addition to the regular customer list, Sokolowski had a list of large industrial accounts with a spreadsheet that included specialized data for each of Burbank's industrial account customers. This specialized information was a pricing/payment formula based on the customer's grease yield percentage after Burbank's processing and Burbank's processing costs. (R.38, A-Ap. 262.) No competitor of Burbank possessed this information and it was not readily available through proper means.

Finally, Sokolowski had route driver spreadsheets which contained the names of accounts in a particular route and data which showed the size of grease traps at each stop and the revenue generated by Burbank per route truck per day. (R.38, A-Ap. 272.) Again, this information was not readily available through proper means. It could be used easily by one of Burbank's competitors to solicit the most profitable accounts or routes.

Sokolowski knew that Burbank considered all of the information in his possession to be confidential. (R.38, A-

Ap.260.) Despite this fact, Sokolowski disclosed Burbank's confidential information to United Grease, and used this information and directed others to use this information successfully to solicit customers away from Burbank. (Id.; A-Ap.105, ¶7.)

On July 31, 2002, Burbank sued Sokolowski, United Liquid Waste, and United Grease (when referring to both collectively, "United") under six different legal theories: (1) computer crime by Sokolowski; (2) breach of fiduciary duties of an agent to his principal by Sokolowski; (3) aiding and abetting the breach of fiduciary duties by United; (4) misappropriation of trade secrets by Sokolowski and United; (5) interference with business relations by Sokolowski and United Grease; and (6) conspiracy by Sokolowski and United. (R.2:1-11, A-Ap.167-77.) After discovery, the parties filed cross motions for summary judgment. In ruling on the motions for summary judgment, the Honorable Diane Nicks gave her decision in two parts and on two separate days.

In the first part of her decision, Judge Nicks granted Sokolowski's and Uniteds' motions for summary judgment

on counts I, IV, V and VI of the complaint, and withheld a decision on Count II, the breach of agency duty by Sokolowski, and Count III, aiding and abetting the breach of agency duty by United. Significant in the first part of the decision was Judge Nicks's finding that none of Burbank's confidential information met the statutory definition of a "trade secret." (R.71, A-Ap. 135) In this first decision, Judge Nicks specifically declined to rule on the issue of whether Wis. Stat. §134.90(6) preempted Burbank's common law breach of agency duty and aiding and abetting breach of agency duty claims that were based on misappropriation of both trade secrets and other confidential information. (R.71, A-Ap.145.)

Ten days later, Judge Nicks finalized her decision by granting summary judgment in favor of Sokolowski and United, not on the merits of Counts II and III of the complaint, but on a finding that the language of Wis. Stat. §134.90(6) somehow preempted Burbank's common law causes of action, which were not based on a "trade secret." (R. 72, A-Ap. 162-63.) What makes this finding both remarkable and illogical is that Wis. Stat. §134.90(6) does

not preempt "any civil remedy not based on misappropriation of a trade secret" and Judge Nicks ruled ten days earlier that Burbank's confidential information did not rise to the level of a "trade secret." Wis. Stat. §134.90(6). (R.72, A-Ap. 135.)

Receiving no justice from the trial court and left without any claims against Sokolowski and United despite Sokolowski's admitted successful use of Burbank's confidential information, Burbank appealed. At the Court of Appeals, Burbank raised three issues. The Court of Appeals also decided each of the three issues against Burbank. (A-Ap.114, 122 and 127, ¶¶24, 37 and 45.)

Burbank first took issue with the trial court's decision that none of its confidential information met the definition of a "trade secret." The trial court was presented with conflicting evidence regarding whether the information possessed by Sokolowski derived independent economic value from not being generally known or readily ascertainable and whether Burbank made reasonable attempts to maintain the secrecy of that information. However, the Court of Appeals, like the trial court before it,

weighed the evidence and found that Burbank's customers were readily ascertainable by proper means and that the pricing information contained in the information possessed by Sokolowski was not unique to Burbank. The Court of Appeals concluded, therefore, that the information possessed by Sokolowski did not meet the statutory definition of a "trade secret." (A-Ap.113-14, ¶23.)

The second issue before the Court of Appeals was that the circuit court erred in concluding that Burbank's common law breach of agency duty claim and aiding and abetting the breach of that agency duty should be dismissed, based on the preemption provision of Wis. Stat. §134.90(6). After review of numerous cases from other jurisdictions, the Court of Appeals implicitly added language to the statute, creating a prohibition against all common law claims for misappropriation of any type of information, whether or not it rises to the level of a "trade secret." (A-Ap.122, ¶37.) In so doing, the Court of Appeals disregarded the plain language of the statute and essentially created two definitions of "trade secret" within the same statute where the

legislature only enacted one definition. This decision forms the basis for this appeal.

The final issue for review was Sokolowski's violation of the computer crimes statute, Wis. Stat. §943.70. On this issue, the Court of Appeals interpreted the statute to prohibit someone from modifying data, destroying data, taking unauthorized possession of data and copying data, but not prohibiting the unauthorized disclosure of that data. (A-Ap.127, ¶45.) In other words, it is not a crime under Wis. Stat. §943.70 for someone to disclose confidential data to whomever they wish, as long as the disclosing party had authority to possess the confidential data. The Court of Appeals decision again violated basic rules of statutory interpretation.

ARGUMENT

I. Summary Judgment Should Not Have Been Granted in this Case, and This Court Reviews the Decision Independently of the Lower Court Decisions.

Summary judgment is appropriate only when "the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Wis. Stat. §802.08(2). On appeal, courts review a grant of summary judgment applying the same methodology as the trial court. *Robinson v. City of West Allis*, 2000 WI 126, ¶26, 239 Wis. 2d 595, 609, 619 N.W.2d 692. This Court will reverse a Court of Appeals who incorrectly decided a legal issue by adding language to a statute or misconstruing previous court decision. *Byrne v. Bercker*, 176 Wis. 2d 1037, 1046, 501 N.W.2d 402, 405 (1993). Most importantly, the court's interpretation of the Uniform Trade Secrets Act is a question of law, which is reviewed independently without deference to lower court decisions. *World Wide Prosthetic Supply, Inc. v. Mikulsky*, 2002 WI 26, ¶8, 251 Wis. 2d 45, 54-55, 640 N.W.2d 764, 766-67.

II. The Court of Appeals' Decision to Preempt Burbank's Breach of Loyalty Claims Resulted from an Improper Reading and Application of the Statute.

The heart of Burbank's objection to the Court of Appeals' decision is the Court's conclusion that the purpose of the preemption provision of the Uniform Trade Secrets

Act was to preclude all common law causes of action for misappropriation of any type of confidential information, even if it is not a "trade secret." The specific objectionable language from the Court of Appeals' decision is:

> We construe §134.90(6) to preempt common law claims for unauthorized use of **confidential information that does not meet the statutory definition of a trade secret**, as well as common law claims, however denominated, that are based solely on allegations or evidence either of misappropriation of a trade secret in violation of §134.90(1) and (2) **or unauthorized use of confidential information**.

(A-Ap.122, ¶37, emphasis added.). This holding, however, ignores the plain language of the statute, ignores the most fundamental rules of statutory construction in Wisconsin, and defies logic.

A. Because the goal of uniformity of application and construction of the Uniform Trade Secrets Act cannot be met, Wisconsin should interpret this statute so as not to offend its rules of statutory interpretation.

It is apparent that the Court of Appeals was attempting to do justice to the provision of Wis. Stat. §134.90(7) which provides that the statute be "applied and

construed to make uniform the law relating to misappropriation of trade secrets among states enacting substantially identical laws." Wis. Stat. §134.90(7). However, even the Court of Appeals admits that it would be impossible for a decision by a Wisconsin court to achieve uniform application of the preemption provision of the Uniform Trade Secrets Act, regardless of how this case is decided. (*See* A-Ap.118-20, ¶33 citing cases favoring the Court of Appeals' interpretation, *but see also* A-Ap.118-22, ¶¶33 – 36 citing cases favoring Burbank's interpretation.) Moreover, the vast majority of the decisions cited by the Court of Appeals are federal courts attempting to interpret state law. As such, those decisions are not binding on any state court who would later interpret its Uniform Trade Secret Act. Therefore, if this Court cannot achieve the goal of uniformity of application, it should render a decision that achieves a goal of conformity with Wisconsin's statutory interpretation rules and cases. Burbank's plain language reading of the statute accomplishes this goal; the Court of Appeals' decision does not.

B. The Court of Appeals' ruling violates several basic rules for statutory interpretation.

Since the enactment of Wisconsin's version of the Uniform Trade Secrets Act (Wis. Stat. §134.90) in 1986, no Wisconsin court has had the opportunity to consider the effect of the preemption provision of that statute, and the exceptions to that provision contained in Wis. Stat. §134.90(6)(b). When the Court of Appeals had its opportunity in this case, however, it violated several basic rules of statutory construction.

1. Courts should look to the plain language of the statute first. The Court of Appeals did not.

Recent clarification by this Court has made it clear that statutory interpretation begins by examining the language of the statute, and if the meaning of the statute is plain, inquiry stops. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶45, 271 Wis. 2d 633, 663, 681 N.W.2d 110, 124. Where statutory language is unambiguous, there is no need to consult extrinsic sources of interpretation. *Id.*, at ¶46, 271 Wis. 2d at 663, 681 N.W.2d

at 124. Extrinsic evidence of legislative intent should not be the primary focus of the inquiry. Id., at ¶44, 271 Wis. 2d at 662, 681 N.W.2d at 124.

Ignoring Wisconsin's well-established rules of statutory construction, however, the Court of Appeals, turned **first** to cases from other jurisdictions construing similar statutes. (A-Ap.116, ¶29.) As this Court has held, the plain meaning of the statute takes precedence over **all extrinsic sources and rules of construction** for that statute. *Wisconsin Citizens Concerned for Cranes and Doves ("WCCCD") v. Wisconsin Department of Natural Resources*, 2004 WI 40, ¶8, 270 Wis. 2d 318, 677 N.W.2d 612. The Court of Appeals did not find the statute ambiguous or engage in any meaningful statutory interpretation analysis to support its reliance on cases from other jurisdictions. Contrary to Wisconsin's rules of interpretation, the Court of Appeals looked to cases from other jurisdictions to determine the meaning of a Wisconsin statute. The Court of Appeals' resort to extrinsic aids first, therefore, was incorrect.

2. Courts should not disregard specifically defined terms of a statute. The Court of Appeals did.

Technical or specially-defined words or phrases in a statute should be given their technical or special definitional meaning. *Kalal*, 2004 WI 58, ¶45, 271 Wis. 2d at 663, 681 N.W.2d at 124. A court is not at liberty to disregard the plain, clear words of the statute. Id., at ¶46, 271 Wis. 2d at 664, 681 N.W.2d at 124. As the United States Supreme Court has recognized, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992).

What the Wisconsin legislature said in its enactment of Wis. Stat. §134.90 was that a "trade secret" should be a specially-defined term. *See* Wis. Stat. §134.90(1)(c). The legislature also said that with respect to preemption of other causes of action that:

> Except as provided in par. (b), this section displaces conflicting tort law, restitutionary law and any other law of this state providing a

> civil remedy **for misappropriation of a trade secret**.

Wis. Stat. §134.90(6)(a) (emphasis added). The legislature also specifically **excluded** certain causes of action from preemption, and saw fit to list those as well. Subsection (6)(b) provides:

> This section does not affect any of the following:
>
> . . .
>
> 2. Any civil remedy **not based upon misappropriation of a trade secret**.

Wis. Stat. §134.90(6)(b) (emphasis added). Consistent throughout the statute is the use of the specially defined term, "trade secret."

Once the trial court concluded that Burbank had no protectable trade secrets, its claims for breach of duty of loyalty and aiding and abetting the breach of that duty were taken out from under the purview of the statute. The statute only applies to remedies based on misappropriation of a "trade secret"—a specially defined term. Wis. Stat. §134.90(6)(a). Because Burbank's confidential information did not meet the definition of "trade secret," Burbank's

claim was based on disclosure of non-trade secret information. "Civil remedies not based upon misappropriation of a trade secret" are not preempted, based on the actual language of the statute. Wis. Stat. §134.90(6)(b). The Court of Appeals' decision preempting Burbank's claims represents a significant error in the interpretation of this statute because the decision ignores the statute's actual language.

The actual language used in the Court of Appeals' ruling only serves to underscore the obvious departure from the plain language of the statute. The Court stated:

> The rationale for this conclusion is that the purpose of the preemption provision is to preserve a single tort action under state law for misappropriation of a trade secret as defined in the statute and thus to eliminate other tort causes of action founded on allegations of **misappropriation of information that may not meet the statutory standard for a trade secret**.

(A-Ap.116, ¶29 emphasis added.) Again, the statutory language excludes only those civil remedies based on misappropriation of trade secrets and does not exclude civil remedies not based on misappropriation of trade secrets.

Wis. Stat. ¶134.90(6). The Court of Appeals' ruling is contrary to the statute's language and should not stand.

The Court of Appeals' ruling also essentially adds language Wis. Stat. §134.90(6)(a). The legislature chose to say that the enactment of the Uniform Trade Secrets Act was designed to displace "conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for **misappropriation of a trade secret**." Wis. Stat. §134.90(6)(a) (emphasis added). The legislature chose to use the defined term, "trade secret," and to stop the preemption at what has been defined as a "trade secret." The Court of Appeals' decision, however, actually added the language "and information that may not meet the statutory standard for a trade secret" to the actual legislatively-enacted language. (A-Ap.116, ¶29.) This overly expansive reading was an improper act of the Court of Appeals, an action previously found to be improper. *See Bruno v. Milwaukee County,* 2003 WI 28, ¶14, 260 Wis. 2d 633, 641, 660 N.W.2d 656, 660. This type of statutory expansion is best left to the legislature.

3. Courts should interpret statutes to avoid unreasonable or illogical results. The Court of Appeals did not.

Upholding the trial court's decision that Burbank's confidential information did not meet the definition of a "trade secret," the Court of Appeals used "a straightforward application of the language" of the definition of a "trade secret." (A-Ap. 110-11, ¶18.) This straightforward application of the actual language yielded a result that Burbank's confidential information did not meet the statutory definition. Rather than use that same narrow statutory definition of "trade secret" while interpreting the preemption provision, however, the Court of Appeals used a much broader definition, not included in the statute, although the legislature used the same term, "trade secret." Under the Court of Appeals' decision, the narrow statutory definition term "trade secret" should be used when determining whether information qualifies for trade secret protection, but a much more expansive, non-statutory definition of "trade secret"—to include all confidential information that does not meet the narrow statutory

definition—should be used when determining which civil remedies are preempted by the statute. This interpretation is absurd and illogical. Whenever possible, statutes are to be interpreted to avoid absurd, unreasonable or illogical results. *Kalal*, 2004 WI 58 at ¶46, 271 Wis. 2d at 663, 681 N.W.2d at 124.

4. Courts should give effect to each and every word of a statute. The Court of Appeals did not.

Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage. *Kalal*, 2004 WI 58 at ¶46, 271 Wis. 2d at 663, 681 N.W.2d at 124. The Court of Appeals decision, however, fails to give effect to each and every word of the statute. Because the Court of Appeals held that Subsection (6) displaces claims not only for misappropriation of "trade secrets" as the statute states, but also for misappropriation of all business information, it emasculates and renders superfluous the exclusion to preemption contained in Wis. Stat. §134.90(6)(b)2. That section provides that preemption does not apply to "any civil remedy **not based upon**

misappropriation of a **trade secret**." Wis. Stat. §134.90(6)(b)2 (emphasis added). If the Court of Appeals decision is upheld, however, the legislature's exception would look much different. It would have been drafted without the use of the specially-defined term, "trade secret" to state that the statute did not apply "to any civil remedy not based upon misappropriation of business information." The Court of Appeals' decision does not give effect to the legislature's use of only the term "trade secret" in Wis. Stat. §134.90(6)(a) and Wis. Stat. §134.90(6)(b)2, and renders its use surplusage or meaningless. Such an action should not be upheld.

C. The Court of Appeals' ruling is expressly contrary to the purpose of Wis. Stat. §134.90.

As noted above, the Court of Appeals stated that its holding—that all common law claims for unauthorized use of confidential information that does not meet the definition of "trade secret" as well as all common law claims based solely on misappropriation of information that does meet the statutory definition—"best effectuates the purpose of

§134.90(6)." (A-Ap.122, ¶37.) In reaching this conclusion, the Court of Appeals was "persuaded by the reasoning of the great majority of courts that have construed the preemption provision." (A-Ap.122, ¶37.) It is unclear whether any of the "great majority" of other courts have independently analyzed the statute, or if they simply relied on the decisions of a few early courts who had the opportunity to construe the statute. What is clear, however, is that none of the "great majority" of courts construing the preemption provision analyzed it in conformity with the intent of the Wisconsin legislature or consistent with Wisconsin's statutory interpretation rules.

Having reviewed the statute in light of Wisconsin's statutory interpretation rules above, one conclusion is certain—the Court of Appeals' decision (and the decisions from other jurisdictions on which it relies) is not in conformity with Wisconsin law. Burbank's plain meaning approach is consistent with Wisconsin's rules of statutory construction.

Burbank's approach is also consistent with the intent expressed by the Wisconsin legislature. In the Prefatory

Note to 1985 Act 236, the legislature indicated the intent of the Act was to codify the basic principles of common law trade secret protection to keep them distinct from patent law. 1985 Act 236, Prefatory Note. The Act also was not designed to apply to non-trade secret cases. Wis. Stats. §134.90(6). While an analysis of the intent must start with the plain language used by the legislature, legislative history is sometimes consulted to confirm or verify a plain-meaning interpretation. *Kalal*, 2004 WI 58 at ¶50, 271 Wis. 2d at 666-67, 681 N.W.2d at 126. The Court of Appeals' decision is contrary to the stated purpose of the statute as derived from both the plain language of the statute and the legislature's stated purpose.

D. Having decided that Burbank's confidential information did not meet the definition of a "trade secret," the Court should have awarded summary judgment to Burbank on its common law claims.

As a basis for holdings related to breach of loyalty duties, this Court has cited sections 387-98 of the *Restatement (Second) of Agency*, which set forth agents' fundamental duties with respect to their principals. See, *Hartford Elevator, Inc.*

v. Lauer, 94 Wis. 2d 571, 580, 289 N.W.2d 280, 284 (1980). Among these sections of the *Restatement*, is the agent's obligation not to use confidential information of the principal.

The continuing nature of an agent's obligation not to use confidential information of the principal, **even after the agency relationship has been terminated**, has been set forth in section 396 of the *Restatement (Second) of Agency*. Section 396 provides in part:

> Unless otherwise agreed, after the termination of the agency, the agent...;
> (b) has a duty to the principal not to use or disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business or the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent.

Restatement (Second) of Agency §396. The purpose of such duties is to provide relief to those whose competitive advantage is compromised through the misappropriation of confidential information. By listing trade secrets as well as other

confidential matters, the Restatement makes this distinction between those items that are confidential and also qualify as a trade secret, and those items which may not qualify as a trade secret, but an agent is still duty-bound not to disclose. Consequently, Burbank may maintain a common law cause of action for breach of agency duty of confidential information that does not rise to the level of a trade secret. Burbank is not suggesting that Sokolowski has a common law duty not to compete. Rather, he simply has a limited duty not to use confidential information acquired during his agency for the purpose of competing.

Sokolowski admitted that he acquired Burbank's customer list while he worked at Burbank and retained the information after the termination of his employment with Burbank. (R.38, A-Ap.249, 255, 260, 262 and 274.) The information about Burbank customers was entered into the United Liquid Waste computer system and used to generate leads for sales calls. (R.38, A-Ap.260; R.6, A-Ap.277-78.) Not only did this information include the name, address and other contact information, but it also contained information about the type of service needed by each customer, as well as the prices being charged by Burbank for those services.

(R.38, A-Ap.260; R.6, A-Ap.277-78.) By taking the information and using it to generate sales leads, it cannot be disputed that Sokolowski has clearly violated this duty of loyalty to Burbank. Summary judgment was proper in favor of Burbank.

According to § 312 of the *Restatement (Second) of Agency*, a party who "intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." This view of third-party liability for involvement in an agent's breach of duty was endorsed by the Wisconsin Supreme Court in *St. Francis Sav. & Loan Assoc. v. Hearthside Homes, Inc.*, 65 Wis. 2d 74, 221 N.W.2d 840 (1974). Under the Court's ruling in *St. Francis*, intention to cause or assist a violation of duty is the controlling consideration, and there is no need to show malice or personal profit. *Id.*, at 81, 221 N.W.2d at 844. Consequently, a party that knowingly aids, abets, or joins a fiduciary in the breach of his duty in order to make a profit becomes jointly liable with the fiduciary for such profits. *Id.* Because it is undisputed that United Liquid Waste and United Grease aided Sokolowski's breach of duty of loyalty, summary judgment in favor of Burbank was proper.

E. The error of the Court of Appeals should be corrected.

The error of the Court of Appeals resulted from its failure to properly apply the well-established rules of statutory construction in Wisconsin. Burbank's construction of the statute was not strained or contrary to the plain language. In fact, Burbank urged the Court of Appeals to adopt a plain reading of the statute, which is clear on its face. The ruling of the Court of Appeals effectively creates a "legal purgatory" in which a plaintiff has absolutely no remedy against an admitted wrongdoer. Allowing a plaintiff to plead in the alternative by allowing a common law tort claim to remain until a final determination on the identity of either confidential or trade secret information does not allow for recovery under two theories for the same action, nor does it prejudice a defendant.

In this case, however, the effect of the granting of summary judgment against Burbank on its trade secret claim and then ruling that the trade secret statue preempted Burbank's non-trade secret based common law claims was to

extinguish any potential legal theory Burbank possessed against Sokolowski and United. Had the legislature intended to regulate claims based on the misappropriation of all confidential information rather than just the specially-defined "trade secrets," it would have clearly articulated the full breadth of the additional information in the definitional section of Section 134.90. Because confidential information that does not rise to the level of a trade secret has the possibility of being protected under preexisting common law theories in Wisconsin, this Court should explicitly reject the Court of Appeals decision.

III. The Court of Appeals' Improper Interpretation of Wis. Stat. §943.70(2)(a)6 Left Burbank Without a Remedy and Potentially Leaves a Big Hole in the Computer Crimes Statute.

Based on the admitted conduct of Sokolowski, Burbank pursued a cause of action for violation of Wisconsin's computer crimes statute, Wis. Stat. §943.70. The statute provides a party with the right to obtain injunctive relief to compel compliance with the provisions of

the statute. Wis. Stat. §943.70(5). At the trial court level, Judge Nicks ruled that Burbank had not adequately pled a cause of action for violation of Wis. Stat. §943.70(2)(a), because the allegation in the complaint did not allege the unauthorized disclosure of the information. (R.71, A-Ap.131-33.)

A. The Court of Appeals improperly construed the phrase "restricted access information" to exclude confidential data.

The Court of Appeals agreed with Burbank's analysis that the allegations of Burbank's complaint could be construed together to potentially state a cause of action under Wis. Stat. §943.70(2)(a)6. However, the Court of Appeals then went on to hold that the language of the statute should not be construed as Burbank suggested. (A-Ap.125-27, ¶¶43-45.) The conclusion of the Court of Appeals was that the statutory phrase "disclosure of restricted access codes or other restricted access information" does not include computer data, but that it refers to "codes, passwords or other information that permits access to a computer system or to programs or data within a system"

and that "the phrase does not refer to the system, program or data access." (A-Ap.127, ¶45.) In essence, the Court of Appeals ruled that although Burbank's complaint may have alleged an unauthorized disclosure of confidential information, such an allegation was not a legally permissible cause of action under the Wis. Stat. §943.70.

1. Once again, the Court of Appeals did not give full effect to each and every word of the plain language of a statute.

As stated above, it is the job of the judiciary to give effect to each and every word, clause and sentence in a statute and to give that effect based on the intent reflected in the language. *Kalal*, 2004 WI 58, ¶46, 271 Wis. 2d at 663, 681 N.W.2d at 124. The language of Wis. Stat. §943.70(2)(a)6 is plain; it prohibits the disclosure of "restricted access information to unauthorized persons." *Kalal*, 2004 WI 58, ¶45, 271 Wis. 2d at 663, 681 N.W.2d at 124.

"Information" can take many different forms. Some information may be accessed by all individuals who have

access to a particular computer system. Other information may have "restricted access" only to those with a specific need to know. Under this statute, the legislature has defined "data" to mean "a representation of **information**, knowledge, facts, concepts or instructions ...." Wis. Stat. §943.70(1)(f) (emphasis added). "Information" may have different levels of access, but all information is included in the definition of "data." Wis. Stat. §943.70(1)(f). Reading this statute any other way does not give effect to the plain meaning of the words used by the legislature.

2. Courts should interpret statutes to avoid absurd results. Once again, the Court of Appeals did not.

Another primary rule of statutory construction is to construe a statute to avoid an absurd result. *WCCCD v. DNR, supra,* ¶6. However, the result of the Court of Appeals' interpretation of Wis. Stat. §943.70(2)(a)6 is absurd. Based on the Court of Appeals' decision, it is a crime to modify computer data, programs or supporting documentation without authorization. Wis. Stat. §943.70(2)(a)1. It is a crime to destroy data, computer

programs or supporting documentation without authorization. Wis. Stat. §943.70(2)(a)2. It is also a crime to access computer programs or supporting documentation without authorization. Wis. Stat. §943.70(2)(a)3. Further, it is a crime to take possession of data, computer programs or supporting documentation without authorization. Wis. Stat. §943.70(2)(a)4. Finally, it is a crime in this state to copy data, computer programs or supporting documentation without authorization. Wis. Stat. 943.70(2)(a)5. Yet, it is not now a crime to disclose confidential data in one's possession to anyone without fear of reprisal or penalty, as long as the disclosing party had the authority to possess the data at the outset.

Such a result is absurd. Reading the plain language of the statute as a whole, in the context in which the "restricted use information" phrase is used, and not in isolation as the Court of Appeals has done, is the proper method to avoid this absurd result. *Kalal*, 2004 WI 58, ¶46, 271 Wis. 2d at 663, 681 N.W.2d at 124.

B. Based on the proper interpretation of Wis. Stat. §943.70 and the admitted conduct of Sokolowski, Burbank should have been granted summary judgment on its computer crimes cause of action.

Sokolowski took Burbank's computer printouts containing information that Sokolowski knew Burbank considered confidential. (R.38, A-Ap.260.) It is beyond dispute that such "information" meets the statutory definition of "data." Wis. Stat. §943.70(1)(f). Sokolowski admitted that he disclosed this information to United Grease without authorization of Burbank. (R.38, A-Ap.260.) Given those facts and a proper application of Wis. Stat. §943.70(2)(a)(6), Sokolowski committed a computer crime for which Burbank should have been allowed to seek injunctive relief. The Court of Appeals' decision should be overturned.

CONCLUSION

The Court of Appeals found that Burbank's confidential information did not meet the statutory definition of a "trade secret." While Burbank disagrees, assuming the information is not a "trade secret" must remove it from

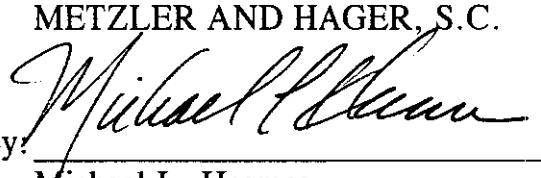
within the purview of Wis. Stat. §134.90, Wisconsin's Uniform Trade Secrets Act, by definition and by law. Ignoring Wisconsin's well-established rules for statutory construction, the Court of Appeals improperly preempted and dismissed Burbank's common law causes of action against Sokolowski and United, even though those causes of action were not based on "trade secrets" by the Court of Appeals' own finding. The result is illogical.

Compounding matters was the Court of Appeals interpretation of Wis. Stat. §943.70. It cannot be reasonably maintained that it is wrong to modify, destroy, access, take possession of, or copy computer data without authorization, but once someone has data with authorization, disclose said data indiscriminately and without civil or criminal penalty. Yet, that is now the law in Wisconsin. Coupled with the Court of Appeals' decision that Wis. Stat. §134.90(6) preempts all civil causes of action for misappropriation of all confidential information, the result is now that employees may indiscriminately take and use or disclose any confidential business information (as long as it does not meet the statutory definition of a "trade secret")

without any penalty. A proper development of the law would be to overturn the Court of Appeals decision.

Respectfully submitted this 9th day of June, 2005.

METZLER AND HAGER, S.C.

By: 

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CERTIFICATION

I certify that this Brief of Plaintiff-Appellant-Petitioner conforms to the rules contained in Wis. Stat. §809.19(8)(b) and §809.62(4), for a brief produced with CG Times, a proportional serif font, with a 13 point body text. The length of this brief is 5,973 words, as calculated by the automatic word count feature of Microsoft® Word.

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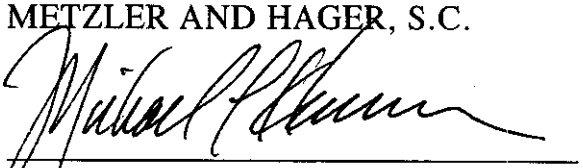
By: 

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SUPREME COURT OF THE STATE OF WISCONSIN

BURBANK GREASE SERVICES, LLC,

Plaintiff-Appellant-Petitioner,

v.

LARRY SOKOLOWKSI;
UNITED GREASE, LLC; and
UNITED LIQUID WASTE RECYCLING, INC.

Defendants-Respondents.

APPENDIX OF PLAINTIFF-APPELLANT-PETITIONER

REVIEW OF COURT OF APPEALS
DISTRICT IV, APPEAL NO. 2004AP468

An Appeal from the Court of Appeals, District IV

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June 9, 2005

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COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 04-0468

Cir. Ct. No. 02CV002397

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

BURBANK GREASE SERVICES, LLC,

PLAINTIFF-APPELLANT,

v.

LARRY SOKOLOWSKI, UNITED GREASE LLC AND UNITED LIQUID WASTE RECYCLING, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: DIANE M. NICKS, Judge. *Affirmed.*

Before Dykman, Vergeront and Higginbotham, JJ.

¶1 VERGERONT, J. Burbank Grease Services, LLC, appeals the circuit court's order dismissing on summary judgment its claims of misappropriation of a trade secret, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and computer crimes. Based on the undisputed facts, we conclude: (1) the customer information Burbank asserts is a trade secret does not

meet the standard in WIS. STAT. § 134.90(1)(c)1;[1] (2) the claims of breach of fiduciary duty against Larry Sokolowski and aiding and abetting that breach against United Grease LLC and United Waste Recycling, Inc., are preempted by § 134.90(6); and (3) Sokolowski did not take computer data from Burbank without authorization in violation of WIS. STAT. § 943.70(2)(a)6. Accordingly, the circuit court correctly granted summary judgment against Burbank on the four claims and we affirm.

BACKGROUND

¶2 Burbank[2] is engaged in the business of collecting and processing used restaurant fry grease, trap grease, and industrial grease. At the relevant time, Burbank had approximately 11,250 customers in Wisconsin and 3,200 in surrounding states. The majority of Burbank's customers are restaurants; at the relevant time about 65% were restaurants, about 34% were grease trap customers, and less than 1%—about fifteen—were industrial customers.[3] Sokolowski was employed by Burbank in various management positions from November 1997 to April 2001. Approximately six months prior to leaving Burbank, Sokolowski was made procurement/territory manager. In that position he oversaw sales people, managed customer relations with industrial clients, and prepared spreadsheets and billings for the accountant. During Sokolowski's employment he sometimes worked at home to meet deadlines, with the knowledge and approval of Burbank.

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

[2] Burbank was purchased by Anamax Group in 1998, but retained the name "Burbank."

[3] Burbank's submissions contain conflicting numbers on these points, but the exact numbers do not affect the outcome of this appeal.

¶3 In October 1998, Burbank distributed a code of conduct that it required all managers to acknowledge and adhere to. Sokolowski acknowledged in writing that he received the code. The code provided that "[n]o ... employee shall disclose any confidential or privileged information to any person within the Company who does not have a need to know or to any outside individual or organization except as required in the normal course of business." In April 1999, all Burbank employees received an employee handbook that contained a provision stating that employees who improperly used or disclosed trade secret or confidential business information, which was defined to include customer lists, would be subject to disciplinary action including termination. The provision also stated that employees may be required to sign a nondisclosure agreement as a condition of employment. Sokolowski was never asked to sign a nondisclosure agreement and there is no evidence any other employee was asked to do so. Sokolowski was also never asked to sign a noncompete agreement.

¶4 In April 2001, Sokolowski resigned his employment with Burbank and began to work for United Liquid as a sales and customer service representative. United Liquid provides waste and cake sludge waste hauling services to industrial, municipal, and commercial clients in Wisconsin, as well as glass, can, and plastic recycling. United Liquid had the ability to handle grease trap collection, but that was a small part of its business. In October 2001, Sokolowski and the shareholders and officers of United Liquid formed United Grease, which began collecting fry grease, trap grease, and industrial grease.

¶5 According to Sokolowski's testimony, sometime after United Grease was formed, he discovered that he still had materials at home from projects he had worked on at home while employed by Burbank. The materials relevant to this appeal are: (1) a hardcopy of a December 2000 partial list of Burbank's grease

trap customers, containing about 2400 names, phone numbers and addresses, sometimes a contact person, the total gallons for the grease traps, and pricing for the small restaurants but no pricing for chain restaurants and large industrial customers;[4] (2) on a computer disk, a 1998 spreadsheet of Burbank's industrial clients that showed the amount of grease collected from each customer times the market rate less a processing fee, which determined what Burbank would pay the customer for the material collected; and (3) also on the computer disk, a spreadsheet showing the amount of collections and revenues per customer for certain drivers in 1998, organized by the driver's route. We will refer to these three items of information collectively as Burbank's "customer information."[5] It is undisputed that, although Burbank authorized Sokolowski to take home information to work on projects for Burbank, including customer information, when Sokolowski left Burbank's employ, Burbank did not ask Sokolowski whether he had any customer or other information from Burbank at home or ask him to return any such information.

¶6 Sokolowski testified that, after United Grease had been in operation several months, he brought the December 2000 grease trap customer list and the computer disk to work. He entered information from the 2000 grease trap customer list into United Liquid's computer system, including the name of the

[4] The description of this list is based on Sokolowski's testimony, which was not disputed. He testified that he destroyed the hardcopy and therefore the actual list was not in evidence. There is some inconsistency in Sokolowski's testimony on whether this list contained phone numbers, but we have inferred it did, since that inference is arguably more favorable to Burbank.

[5] The computer disk also contained additional information from Sokolowski's employment by Burbank that Burbank does not contend is trade secret or confidential information.

restaurant, phone number, address, approximate size of the grease trap, and the approximate pricing, and he used this information to solicit customers for United Grease. Sokolowski also testified that he used the 1998 spreadsheet of Burbank's industrial clients to create his own spreadsheet to use in soliciting industrial customers for United Grease. He did not, he testified, use the 1998 driver spreadsheet.

¶7 According to Sokolowski, United Grease acquired about eighty fry grease customers, almost all former Burbank customers, and 157 grease trap customers, of which all but sixty to seventy were former Burbank customers. As for industrial customers, the evidence shows that United Grease acquired either one or two of Burbank's former customers.

¶8 Eventually Burbank became aware that Sokolowski was soliciting its customers and filed this action. The complaint alleged: (1) Sokolowski misappropriated Burbank's trade secrets in violation of WIS. STAT. § 134.90; (2) Sokolowski breached his fiduciary duty to his principal, Burbank; (3) United Grease and United Liquid Waste aided and abetted Sokolowski in breaching his fiduciary duty; and (4) Sokolowski willfully and knowingly took possession of computer data from Burbank's computer system without authorization in violation of WIS. STAT. § 943.70(2). All parties filed motions for summary judgment and the circuit court granted the defendants' motions, dismissing the complaint.

¶9 The circuit court agreed with the parties that there were no genuine issues of material fact. With respect to the trade secret claim, the circuit court concluded that no independent economic value was derived from the customer information because it was generally known and readily ascertainable by proper means such as approaching restaurant personnel and inquiring about their rates

and, alternatively, Burbank did not make reasonable efforts to maintain the secrecy of the information. With respect to the two breach of fiduciary duty claims, the court agreed with the defendants that these claims were preempted by WIS. STAT. § 134.90(6). Finally, in addressing Burbank's arguments that Sokolowski committed a computer crime under WIS. STAT. § 943.70(2), the court concluded there was no violation of subd. (2)(a)4 because Sokolowski was authorized to take possession of the computer disks at the time he took possession. The court declined to address Burbank's arguments that Sokolowski violated other subdivisions of para. (2)(a) because Burbank had not pleaded those violations in its complaint. Burbank challenges on appeal the circuit court's grant of summary judgment against it on these four claims.[6]

DISCUSSION

¶10 In reviewing the grant or denial of a summary judgment, we apply the same methodology as the trial court and review de novo the grant or denial of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). In evaluating the evidence, we draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. ***Grams v. Boss***, 97 Wis. 2d 332, 339, 294 N.W.2d 473 (1980). Whether an inference is reasonable and whether more than one reasonable inference may be

[6] The complaint also alleged claims of interference with business relations by Sokolowski and United Grease and conspiracy by all three defendants. The circuit court granted summary judgment in favor of the defendants on these claims, and Burbank has not appealed the dismissal of those claims.

drawn are questions of law. ***Hennekens v. Hoerl***, 160 Wis. 2d 144, 162, 465 N.W.2d 812 (1991).

I. *Misappropriation of a Trade Secret, WIS. STAT. § 134.90*

¶11 WISCONSIN STAT. § 134.90(2) provides that "[n]o person ... may misappropriate ... a trade secret by ... [a]cquiring the trade secret of another by means which the person knows or has reason to know constitute improper means ... or by disclosing or using without express or implied consent the trade secret of another" under certain specified circumstances. Section 134.90(1)(c) defines a trade secret as

> [I]nformation, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:
>
> 1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> 2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

¶12 Burbank asserts there is evidence showing that its customer information meets the definition of a trade secret and therefore the circuit court erred in weighing the competing evidence rather than letting a jury decide. We observe that this appellate position appears to be inconsistent with Burbank's argument to the circuit court that it was entitled to summary judgment on the trade secret claim. Nevertheless, because we independently review the record on an appeal from a summary judgment, we will address Burbank's appellate argument that there are factual disputes that are necessary to resolve before deciding if the criteria in WIS. STAT. § 134.90(1)(c) are met.

¶13 We first consider WIS. STAT. § 134.90(1)(c)1. Burbank contends the evidence shows that its customer information is not generally known or readily ascertainable and that it is of economic value to a competitor like United Grease because it saves United Grease time necessary to compile its own list of customers. Burbank also argues that it is advantageous for a competitor to know the prices Burbank charges when soliciting Burbank's customers because the competitor can then offer a lower price.

¶14 Customer lists may, depending on the circumstances, meet the definition of a trade secret under WIS. STAT. § 134.90(1)(c). ***Minuteman, Inc. v. Alexander***, 147 Wis. 2d 842, 857, 434 N.W.2d 773 (1989). In cases decided before § 134.90 was enacted, the supreme court applied the six factors in RESTATEMENT, 4 TORTS, § 757 to decide whether customer lists were trade secrets.[7] The supreme court decided customer lists were not trade secrets in the following cases: ***Abbott Labs. v. Norse Chem. Corp.***, 33 Wis. 2d 445, 463, 466, 147 N.W.2d 529 (1967) (names, addresses, and contact persons for customers of an artificial sweetener, where evidence was that the customers were common knowledge within the industry and the lists did not contain complicated marketing

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[7] The six factors are:

> (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Corroon & Black v. Hosch, 109 Wis. 2d 290, 295, 325 N.W.2d 883 (1982) (citing RESTATEMENT, 4 TORTS, § 757 cmt. b (1939)).

data on projected needs of the customers or market habits); ***American Welding & Eng'g Co. v. Luebke***, 37 Wis. 2d 697, 702, 155 N.W.2d 576 (1968) (names, addresses, phone number of the customer, sometimes the names of a number of employees and positions of various individuals for customers of a manufacturer of steel products); ***Gary Van Zeeland Talent, Inc. v. Sandas***, 84 Wis. 2d 202, 211-12, 216, 267 N.W.2d 242 (1978) (talent agency's list of club names where evidence showed the names were readily available by means of inquiry from established sources—telephone directories, chambers of commerce, and newspaper advertising); and ***Corroon & Black v. Hosch***, 109 Wis. 2d 290, 296-97, 325 N.W.2d 883 (1982) (insurance agency's list of names and address of insurance policy holders, contact names, renewal dates, and amounts of coverage). The rationale underlying these cases, in general, is that the customer lists involved were "merely the outgrowth of normal marketing endeavors" and "the time and money expended ... were spent on develop[ing] the market [that] the ... list represent[ed], rather than on the compilation of the information." ***Id.*** at 297.

¶15 In a subsequent case, ***B.C. Ziegler & Co. v. Ehren***, 141 Wis. 2d 19, 28-29, 414 N.W.2d 48 (1987), the supreme court did accord trade secret status to a securities underwriter's list that identified persons who had invested in the securities, had sufficient money to make investments, and regularly invested in bonds as opposed to other investments. The court distinguished this list from those in the prior cases on, among other grounds, the fact that this list contained "specialized information" and was not "merely a function of record keeping, a byproduct of a business, but was in a significant sense a vital asset of the business upon which efforts and money were expended in its own right." ***Id.*** at 28.

¶16 After WIS. STAT. § 134.90 was enacted, the supreme court in ***Minuteman***, 147 Wis. 2d at 857, reversed and remanded the lower courts'

decisions that a furniture stripper's list of inquiries in response to advertisements and list of customer names and orders were not trade secrets. The supreme court did so because the lower courts had applied the six Restatement factors. While the supreme court stated that those factors were still helpful, *id.* at 853, it concluded that a remand was necessary to allow the circuit court to apply the legal standard embodied in the recently enacted § 134.90. *Id.* at 857. In noting that "[s]ome customer lists are afforded protection under the UTSA [Uniform Trade Secret Act]," the supreme court quoted with approval from an Indiana case:

> This is not to say that every customer list would be denied trade secret status under the uniform act. We are well aware, for example, ... that in certain sectors of the business community identical or nearly identical products and/or services are sold to a small, fixed group of purchasers. In such an intensely purchaser-oriented market, a supplier's customer list could well constitute a trade secret.

Id. (citation omitted).

¶17 This court relied on the above-quoted language in ***ECT Int'l, Inc. v. Zwerlein***, 228 Wis. 2d 343, 353, 597 N.W.2d 479 (Ct. App. 1999), to conclude that the customer lists and prospect lists belonging to the distributor of software used in the design and documentation of electrical systems met the requirements of WIS. STAT. § 134.90(1)(c)1.

¶18 Other than ***ECT***, we are not aware of any reported Wisconsin case decided after ***Minuteman*** that addresses whether a customer list meets the

requirements of WIS. STAT. § 134.90(1)(c)1.[8] We are uncertain from our reading of ***Minuteman*** whether the supreme court intended that the rationale it had expressed in its previous decisions on customer lists remain valid after the enactment of § 134.90. However, we need not resolve that uncertainty in this case because a straightforward application of the language of § 134.90(1)(c)1 to the undisputed facts of this case persuades us that the names, addresses, and contact persons of Burbank's customers are readily ascertainable by proper means. The undisputed evidence is that any business that cooks or processes food is a potential customer for the services Burbank provides, and Burbank's own witnesses acknowledge that anyone can identify the businesses that likely have a need for the services Burbank provides from such common sources as the telephone book, the internet, and trade associations. As for contact persons, the evidence is that one can find that out by asking at the business.

¶19 Apparently aware of the weakness of an argument that its customers' names, addresses, and contact persons are not readily ascertainable, Burbank emphasizes that the inclusion of the pricing information requires a different result. The undisputed evidence is that the price for the industrial customers was determined by the number of pounds of grease collected times the market rate less a fee for processing, and this was standard in the industry. According to Burbank's witnesses, the charge for fry grease is a per collection charge and for trap grease the charge is per volume with some additional charges if extra services

[8] The Seventh Circuit Court of Appeals, applying ***Minuteman***, concluded that a list of purchasers of a company that produced water treatment chemicals and services was not a trade secret under WIS. STAT. § 134.90 because the "group of purchasers ... [were] neither fixed nor small, the products [were] used in ... common items," and "[t]he target market for the products [was] broad...." ***Nalco Chem. Co. v. Hydro Techs., Inc.***, 984 F.2d 801, 804 (7th Cir. 1993).

are required. There is no evidence that these methods of charging were unique to Burbank. Sokolowski testified that Burbank had three price groups for fry grease customers when he left and two for trap grease, and there was no contradictory testimony on this point.[9]

¶20 Burbank does not appear to assert that its method of establishing a price for customers is unique or complicated; rather, it seeks to protect the information of the actual price charged a customer at a particular time. Burbank relies on testimony that, according to Burbank, shows that customers will not tell a competitor what they are already paying for the services because they are in a better bargaining position if they hear the offer first. This testimony, asserts Burbank, conflicts with Sokolowski's testimony that one can readily find out the price a customer of another company is being charged by asking. Thus, Burbank's position is that it is entitled to a trial on whether the price information accompanying some of the customers' names is a trade secret.

¶21 There appears to be no reported Wisconsin case addressing the trade secret status of pricing information. However, because WIS. STAT. § 134.90 is Wisconsin's version of the UTSA, we may look for guidance in decisions of other jurisdictions interpreting this provision. ***World Wide Prosthetic Supply, Inc. v. Mikulsky***, 2002 WI 26, ¶9, 251 Wis. 2d 45, 640 N.W.2d 764. In doing so, we bear in mind that § 134.90(7) requires that § 134.90 be "applied and construed to make uniform the law relating to misappropriation of trade secrets among states enacting substantially identical laws."

---

[9] Burbank does not make clear whether there was any information about fry grease customers on the three sets of information it contends are a trade secret, but we include the prices for these customers nonetheless.

¶22 Generally, it appears that when prices are based on complicated or unique formulas that the customers do not know about, courts conclude the information meets the standard embodied in WIS. STAT. § 134.90(1)(c)1. *See, e.g.*, ***Pepsico, Inc. v. Redmond***, No. 94-C-6838, unpublished slip op. at 11-12 (N.D. Ill. 1996);[10] ***Hydraulic Exch. and Repair, Inc. v. KM Specialty Pumps, Inc.***, 690 N.E.2d 782, 786 (Ind. Ct. App. 1998). *See also* ***Den-Tal-Ez Inc. v. Siemens Capital Corp.***, 566 A.2d 1214, 1230 (Pa. Super. Ct. 1988) (decided under RESTATEMENT OF TORTS § 757 (1939), not the UTSA). However, when there is no such unique or complicated information behind the pricing, the actual price charged does not meet that standard because—in the absence of special circumstances—it can be readily ascertainable from the customers themselves by proper means. *See, e.g.*, ***IVS Hydro, Inc. v. Robinson***, 93 Fed. Appx. 527-28, 2004 WL 626828 (Fourth Cir. 2004 (W. Va)); ***Unisource Worldwide, Inc. v. Carrara***, 244 F. Supp. 2d 977, 986-87 (C.D. Ill. 2003); ***Conagra, Inc. v. Tyson Foods, Inc.***, 30 S.W.3d 725, 729-30 (Ark. 2000); ***Carbonic Fire Extinguishers, Inc. v. Heath***, 547 N.E.2d 675, 678 (Ill. App. Ct. 1989). *See also* ***Carpetmaster of Latham, Ltd. v. Du Pont Flooring Sys., Inc.***, 12 F. Supp. 2d 257, 261-62 (N.D. N.Y. 1998) (decided under RESTATEMENT OF TORTS § 757 (1939), not UTSA). One of the special circumstances is a contract that prohibits customers from disclosing the price. *See* ***Northern States Power Co. v. North Dakota Pub. Serv. Comm'n***, 502 N.W.2d 240, 241, 243 (N.D. 1993).

¶23 We conclude this general approach is sound and apply it here. There is no evidence that Burbank's prices are based on information not known to the

[10] We may cite to unpublished opinions from other jurisdictions. ***Predick v. O'Connor***, 2003 WI App 46, ¶12 n.7, 260 Wis. 2d 323, 660 N.W.2d 1.

customers. There is also no evidence of a contract prohibiting Burbank's customers from disclosing the price Burbank charges, nor is there evidence that it is the custom in this industry for customers not to disclose the prices they are charged. Viewed most favorably to Burbank, the evidence from its own witnesses is that customers do disclose the prices they pay, although particular customers may choose not to do so in particular situations. Indeed, the only reasonable inference from the evidence is that Burbank determines what price to charge at least in part based on what competitors are charging, which it learns from customers. We conclude the evidence is insufficient, as a matter of law, to show that the prices Burbank charges its customers are not readily ascertainable by proper means.[11]

¶24 Because we conclude the evidence, viewed most favorably to Burbank, does not show that the information Burbank seeks to protect meets the requirements of WIS. STAT. § 134.90(1)(c)1, Burbank is not entitled to a trial on its trade secret claim. This conclusion makes it unnecessary for us to address whether Burbank made reasonable efforts under the circumstances to maintain the secrecy of this information, as required by § 134.90(1)(c)2.

II. *Preemption of Breach of Fiduciary Duty Claims, WIS. STAT. § 134.90(6)*

¶25 Burbank contends the circuit court erred in concluding that its common law breach of fiduciary duty claims—the claim that Sokolowski breached his fiduciary duty to Burbank and the claim that United Grease and United Liquid

[11] Because of this conclusion, we need not address the respondents' argument that the 1998 industrial customer information has no economic value because of its age and the 1998 driver list has no economic value for that and other reasons.

Waste aided and abetted Sokolowski in that breach—were preempted by WIS. STAT. § 134.90(6). This subsection provides:

> (6) EFFECT ON OTHER LAWS. (a) Except as provided in par. (b), this section displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret.
>
> (b) This section does not affect any of the following:
>
> 1. Any contractual remedy, whether or not based upon misappropriation of a trade secret.
>
> 2. Any civil remedy not based upon misappropriation of a trade secret.
>
> 3. Any criminal remedy, whether or not based upon misappropriation of a trade secret.

¶26 According to Burbank, this provision means that, if a plaintiff has a claim for unauthorized use of confidential information that meets the statutory criteria of WIS. STAT. § 134.90(1) and (2), that claim must be brought under the statute, but if the statutory criteria are not met, there is no preemption of any common law claim that might exist based on the unauthorized use of the information. Alternatively, Burbank argues that, even if § 134.90(6) means that all claims based solely on the unauthorized use of confidential information are preempted, its breach of fiduciary duty claims are not based solely on the unauthorized use of its confidential information and therefore they are not preempted.

¶27 The respondents assert that, because the information Burbank seeks to protect does not meet the statutory definition of a trade secret, any claim that is based solely on the unauthorized use of that information is preempted. In their view, the breach of fiduciary duty claims are based solely on the unauthorized use of Burbank's customer information.

¶28 The only Wisconsin case we have located discussing WIS. STAT. § 134.90(6) is ***Minuteman, Inc. v. Alexander***, 147 Wis. 2d 842, 434 N.W.2d 773 (1989). There the court ruled that, based on § 134.90(6)(a), the test it had established for a trade secret in ***Corroon & Black v. Hosch***, 109 Wis. 2d 290, 325 N.W.2d 883 (1982), was no longer the legal standard. 147 Wis. 2d at 852. This brief ruling does not resolve the preemption issues presented on this appeal. We therefore consider cases from other jurisdictions.

¶29 The first issue we address is whether WIS. STAT. § 134.90(6)(a) preempts common law claims for unauthorized use of allegedly confidential information that does not meet the statutory definition of a trade secret. Based on our own research and the cases provided by the parties, it is evident that the majority of cases in other jurisdictions addressing this issue have decided that such claims are preempted. The rationale for this conclusion is that the purpose of the preemption provision is to preserve a single tort action under state law for misappropriation of a trade secret as defined in the statute and thus to eliminate other tort causes of action founded on allegations of misappropriation of information that may not meet the statutory standard for a trade secret. ***Leucadia, Inc. v. Applied Extrusion Techs., Inc.***, 755 F. Supp. 635, 637 (D. Del. 1991). *See also* ***Composite Marine Propellers v. Van Der Woude***, 962 F.2d 1263, 1265 (7th Cir. 1992) (the preemption provision of the Illinois statute "abolishe[s] all common law theories of misuse of confidential information.... Unless defendants misappropriated a (statutory) trade secret, they did no legal wrong."); ***Thomas & Betts Corp. v. Panduit Corp***, 108 F. Supp. 2d 968, 971 (N.D. Ill. 2000) (the Illinois Trade Secrets Act was meant "'to codify all the various common law remedies for theft of ideas'") (citing ***Learning Curve Toys, L.P. v. Playwood Toys, Inc.***, No. 94-C-6884, 1999 WL 529572, *3 (N.D. Ill. 1999)); ***Smithfield***

Ham and Prods. Co., Inc. v. Portion Pac., Inc., 905 F. Supp. 346, 348 (E.D. Va. 1995) (purpose of the preemption provision is to "prevent inconsistent theories of relief for the same underlying harm by eliminating alternative theories of common law recovery which are premised on the misappropriation of a trade secret").

¶30 If a common law claim for unauthorized use of information that did not meet the statutory definition of a trade secret were permitted, the result "would undermine the uniformity and clarity that motivated the creation and passage of the Uniform Act." ***Auto Channel, Inc. v. Speedvision Network, LLC***, 144 F. Supp. 2d 784, 789 (W.D. Ky. 2001). *See also* ***Bliss Clearing Niagara, Inc. v. Midwest Brake Bond Co.***, 270 F. Supp. 2d 943, 949 (W.D. Mich. 2003) (allowing otherwise displaced tort claims to proceed on the basis that the information may not rise to the level of a trade secret would defeat the purpose of the UTSA); ***Thomas & Betts***, 108 F. Supp. 2d at 972-73 (if there were no preemption when the confidential information might not rise to the level of a trade secret, the preemption provision would be meaningless).

¶31 Burbank appears to argue that our preemption analysis should depend on whether the common law claim is denominated as breach of fiduciary duty rather than unauthorized use of confidential information, perhaps implicitly suggesting that the latter claim would be preempted, but certainly arguing that the former is not. However, the majority of the courts that have considered the issue have not relied on the label of the common law claim, but have examined the facts alleged or proved in support of the claim to determine whether they are the same facts that support the statutory claim for the misappropriation of a trade secret. *See, e.g.*, ***Weins v. Sporleder***, 605 N.W.2d 488, 491 (S.D. 2000). When the common law claims, however denominated, are based solely on the facts that support the statutory claim for a misappropriation of a trade secret, the majority of

courts considering this issue have concluded that the common law claims are preempted.

¶32 Using this approach, numerous courts have concluded that claims for breach of fiduciary duty are preempted when the breach is the alleged unauthorized use of confidential information. ***Omnitech Int'l, Inc. v. Clorox Co.***, 11 F.3d 1316, 1330 (5th Cir. 1994) (Louisiana statute; breach of fiduciary duty claim preempted because based solely on allegations that support misappropriation of trade secret claim).; ***Composite Marine Propellers***, 962 F.2d at 1265; ***Auto Channel***, 144 F. Supp. 2d at 789-90 (breach of fiduciary duty claim preempted to extent it involves disclosure of trade secrets); ***Automed Techs., Inc. v. Eller***, 160 F. Supp. 2d 915, 922 (N.D. Ill. 2001); ***Thomas & Betts***, 108 F. Supp. 2d at 972-73; ***Thermodyne Food Serv. Prods., Inc. v. McDonald's Corp.***, 940 F. Supp. 1300, 1309 (N.D. Ill. 1996), ***Frantz v. Johnson***, 999 P.2d 351, 358 n.3 (Nev. 2000) (breach of fiduciary claim and other claims preempted because they are "completely dependent on the facts concerning misappropriation of trade secrets"). The rationale in these cases is that "breaching a duty of loyalty by using confidential information is still misappropriation of a trade secret," ***Automed Techs,*** 160 F. Supp. 2d at 922; or, put differently, "fiduciary duty" adds nothing of significance when there is no independent basis for such duty. ***Composite Marine Propellers***, 962 F.2d at 1265

¶33 On the other hand, where a claim for breach of fiduciary duty is based on allegations or factual showings that are not solely dependent on misappropriation of a trade secret or unauthorized use of allegedly confidential information, courts have concluded there is no preemption. ***Lucini Italia Co. v. Grappolini***, 231 F. Supp. 2d 764, 770 (N.D. Ill. 2002) (declining to dismiss claim for breach of fiduciary duty because the factual allegations—that the plaintiff's

consultant used his position of trust to contract on his own behalf for his own interests—were independent of the misappropriation of trade secret claim); ***Automed Techs.***, 160 F. Supp. 2d at 922 (allowing claim for breach of fiduciary duty to proceed to the extent it was based on soliciting former co-employees to compete against former employer); ***Paint Brush Corp. v. Neu***, 599 N.W.2d 384, 393 (S.D. 1999) (holding that breach of duty of loyalty claim based on evidence that defendant was taking steps to compete with employer while still employed was not preempted).[12]

[12] A federal court in Wisconsin adopted this approach in ***Corporate Express Office Prods. v. Brown***, Nos. 00-C-608-C, 00-C-666-C, 2001 WL 34381111, at *12 (W.D. Wis. July 18, 2001), concluding that the breach of fiduciary duty claim was preempted insofar as it was based on the allegations of misappropriation of a trade secret, but not preempted insofar as it was based on allegations that the defendant conspired to take business away from his employer and failed to have another employee sign a noncompete agreement. ***Id.*** The court went on to conclude, however, that the breach of fiduciary duty claim should nonetheless be dismissed on summary judgment because no evidence was presented to support the allegation regarding the noncompete agreement and the evidence regarding taking business did not establish that the defendant did anything more than investigate other employment opportunities while still employed by the plaintiff. ***Id.*** at *13-14.

(continued)

¶34 Burbank urges us to follow the approach of a minority of cases holding that claims are not preempted if they are based on the unauthorized use of information that does not meet the statutory requirements of a trade secret. However, we do not find these cases persuasive. In ***Combined Metals of Chicago Ltd. P'ship v. Airtek, Inc.***, 985 F. Supp. 827, 830 (N.D. Ill. 1997), the court agreed with the claimant that dismissal of its claim of breach of a fiduciary duty on preemption grounds was premature, because if the information did not prove to be a trade secret under the Illinois statute, as alleged, the preemption provision

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Courts have followed this same analysis with other types of common law claims, concluding they are preempted when they are based solely on, or to the extent they are based on, the allegations or the factual showings of unauthorized use of confidential information or misappropriation of a trade secret. *See* ***Penalty Kick Mgmt. Ltd. v. Coca Cola Co.***, 318 F.3d 1284, 1297-98 (11th Cir. 2003) (Georgia statute: conversion, breach of confidential relationship and duty of good faith, unjust enrichment and quantum meruit); ***On-Line Techs. v. Perkin Elmer Corp.***, 141 F. Supp. 2d 246, 260-61 (D. Conn. 2001) (unjust enrichment); ***Auto Channel, Inc. v. Speedvision Network, LLC***, 144 F. Supp. 2d 784, 790, 793, (W.D. Ky. 2001) (unfair competition and misrepresentation); ***Glasstech, Inc. v. TGL Tempering Sys., Inc.***, 50 F. Supp. 2d 722, 730-31 (N.D. Ohio 1999) (common law claim of misappropriation of trade secrets as well as quantum merit and unjust enrichment); ***Powell Prods., Inc. v. Marks***, 948 F. Supp. 1469, 1474-76 (D. Colo. 1996) (unfair competition and conversion); ***Web Communications Group, Inc. v. Gateway 2000, Inc.***, 889 F. Supp. 316, 321 (N. D. Ill. 1995) (unjust enrichment); ***Hutchison v. KFC Corp.***, 809 F. Supp. 68, 71-72 (D. Nev. 1992) (Nevada statute, unjust enrichment and unfair competition); ***Leucadia, Inc. v. Applied Extrusion Techs., Inc.***, 755 F. Supp. 635, 636-37 (D. Del. 1991) (unfair competition/unfair trade or business practices); ***R.K. Enterprise, LLC v. Pro-Comp Mgmt., Inc.***, No. 03-409, 2004 WL 65133 (Ark. April 1, 2004) (conversion and conspiracy); ***Savor, Inc. v. FMR Corp.***, 812 A.2d 894, 898 (Del. 2002) (unfair competition and conspiracy); ***Weins v. Sporleder***, 605 N.W.2d 488, 491 (S.D. 2000) (fraud and deceit); ***Ed Nowogroski Ins., Inc. v. Rucker***, 944 P.2d 1093, 1097 (Wash. App. 1997) (misuse of confidential information and intentional interference).

Conversely, courts have concluded there is no preemption when the other types of common law claims are based on allegations or factual showings that are either independent of or in addition to those that form the basis for a claim of misappropriation of a trade secret. *See* ***Bliss Clearing Niagara, Inc. v. Midwest Brake Bond Co.***, 270 F. Supp. 2d 943, 949-50 (W.D. Mich. 2003) (tortious interference with contract and unfair competition); ***Powell Products***, 948 F. Supp. at 1474 (interference with business relationships, conspiracy, and conversion); ***Smithfield Ham and Prods. Co., Inc. v. Portion PAC, Inc.***, 905 F. Supp. 346, 348, 351 (E.D. Va. 1995) (tortious interference with contractual relations and business expectancy); ***Fred's Stores of Mississippi, Inc. v. M & H Drugs, Inc.***, 725 So. 2d 902, 908 (Miss. 1998) (conspiracy).

was inapplicable. The court's analysis is brief and does not discuss, let alone counter, the reasoning relied on by the many courts that have come to the opposite conclusion.

¶35 In ***Stone Castle Financial, Inc. v. Friedman, Billings and Ramsey & Co.***, 191 F. Supp. 2d 652, 659 (E.D. Virginia 2002), the court did discuss ***Smithfield Ham***, 905 F. Supp. at 348, and a number of other cases holding that there was preemption, but we do not agree with the ***Stone Castle*** court's reading of those cases. The ***Stone Castle*** court read them to be dependent upon a determination or assumption that the alleged confidential information met the statutory definition of a trade secret. However, this reading, in our view, overlooks the fundamental reasoning of the cases discussed by the ***Stone Castle*** court: but for ***Combined Metals***, the cases are based on the majority view that the UTSA is meant to replace tort claims for unauthorized use of confidential information with a single statutory remedy. The approach of ***Stone Castle*** and ***Combined Metals*** is inconsistent with this intent, because it allows a tort remedy for the unauthorized use of information that does not meet the statutory criteria for a trade secret.

¶36 In ***Coulter Corp. v. Leinert***, 869 F. Supp. 733, 734-36 (E.D. Mo. 1994), the court's decision that the claim of breach of the duty of loyalty was not preempted appears to be based in part on the particular elements of that claim under Florida common law. This is helpful to Burbank only if Wisconsin common law is similar, but, as we discuss below in paragraph 39, it is not. To the extent the ***Coulter*** court's ruling was based on the view that a claim for the unauthorized use of confidential information not meeting the statutory definition of a trade

secret is not preempted, the court does not explain why this is a reasonable construction of the statute.[13]

¶37 We are persuaded by the reasoning of the great majority of courts that have construed the preemption provision, and we adopt that approach. We conclude that the purpose of WIS. STAT. § 134.90(6) is to make clear that § 134.90 is intended to provide a single, uniform standard for the type of information that, in the absence of a contract, is entitled to protection from misappropriation under civil law. We construe § 134.90(6) to preempt common law claims for unauthorized use of confidential information that does not meet the statutory definition of a trade secret, as well as common law claims, however denominated, that are based solely on allegations or evidence either of misappropriation of a trade secret in violation of § 134.90(1) and (2) or unauthorized use of confidential information. We conclude that this construction best effectuates the purpose of § 134.90(6).

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[13] The two other cases on which Burbank relies do not support its position. In ***Micro Display Sys., Inc. v. Axtel, Inc.*** 699 F. Supp. 202, 205 (D. Minn. 1988), the court denied summary judgment, on preemption grounds, for claims of interference with contractual relations, misappropriation, conversion, misrepresentation, conspiracy, unjust enrichment, and unfair competition claims because there were allegations or evidence of wrongdoing in addition to misappropriation of trade secrets—such as making misrepresentations to obtain the plaintiff's product and technical assistance from its employees. The court concluded that a trial was necessary to determine "whether the only real harm was the alleged misappropriation of trade secrets," in which case, the court recognized, the tort claims would be preempted. ***Id.*** at 205.

In ***Lucini Italia Co. v. Grappolini***, 231 F. Supp. 2d 764, 770 (N.D. Ill. 2002), as we have noted above in paragraph 33, the court declined to dismiss the claim for breach of fiduciary duty because there were factual allegations independent of the misappropriation of trade secret claim—that the plaintiff's consultant used his position to contract on his own behalf for his own interests. However, after a trial to the court, the court again took up the preemption issue, noting that now the factual record was more fully developed. ***Lucini Italia Co. v. Grappolini***, No. 01 C 6405, 2003 WL 1989605, 822 (N.D. Ill. April 28, 2003). The court concluded that the breach of fiduciary duty claim, fraud, and promissory estoppel claims were preempted by the Illinois trade secret statute because they were "inextricably linked to the trade secret claim." ***Id.***

¶38 We now turn to the evidence in this case to determine whether there is evidence, in addition to the evidence of the use of Burbank's customer information, that shows that the respondents breached a fiduciary duty or aided and abetted a breach of fiduciary duty. Besides the evidence of the customer information, Burbank refers us to the complaint, which contains allegations suggesting that Sokolowski was competing with Burbank while still employed by Burbank. However, while the allegations in the complaint may have been sufficient at an earlier stage to avoid dismissal based on preemption of the fiduciary duty claims, Burbank cannot rely on allegations in the complaint to defeat a motion for summary judgment. *See* ***Caraway v. Leathers***, 58 Wis. 2d 321, 323, 206 N.W.2d 193 (1973). Burbank points to no evidence, and we see none, that creates a reasonable inference that Sokolowski took any action during his employment that was inconsistent with his duty to his employer.

¶39 Burbank may be suggesting that Sokolowski had a duty not to compete with his former employer after he left Burbank's employ. However, that is not the law in Wisconsin. An employee that is an agent for his or her employer owes the employer a duty to act solely for the benefit of the employer during the term of employment; an employee breaches that duty by secretly engaging in competition with the employer during the employment term. ***General Auto. Mfg. Co. v. Singer***, 19 Wis. 2d 528, 534-35, 120 N.W.2d 659 (1963). However, an agent is free to engage in competition with a principal after the employment relationship terminates, ***Modern Materials, Inc. v. Advanced Tooling Specialists***, 206 Wis. 2d 435, 447, 557 N.W.2d 835 (Ct. App. 1996), unless, of course, there is a valid noncompete agreement to the contrary. *See* WIS. STAT. § 103.465, "Restrictive covenants in employment contracts."

¶40 We conclude the claim that Sokolowski breached his fiduciary duty to Burbank is based solely on evidence that he used and disclosed Burbank's customer information after the termination of his employment with Burbank. Accordingly, that claim and the aiding and abetting claim against United Liquid and United Grease are preempted by WIS. STAT. § 134.90(6). The circuit court therefore correctly dismissed both claims.

III. *Computer Crime, WIS. STAT. § 943.70(2)(a)(6)*

¶41 Burbank contends it adequately pleaded and proved a violation of WIS. STAT. § 943.70(2)(a)6, which provides a penalty for anyone who

> willfully, knowingly and without authorization ... [d]iscloses restricted access codes or other restricted access information to unauthorized persons.[14] (Footnote added.)

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[14] WISCONSIN STAT. § 943.70(2)(a) provides in full:

> (2) OFFENSES AGAINST COMPUTER DATA AND PROGRAMS.
>
> (a) Whoever willfully, knowingly and without authorization does any of the following may be penalized as provided in pars. (b) and (c):
>
> 1. Modifies data, computer programs or supporting documentation.
>
> 2. Destroys data, computer programs or supporting documentation.
>
> 3. Accesses computer programs or supporting documentation.
>
> 4. Takes possession of data, computer programs or supporting documentation.
>
> 5. Copies data, computer programs or supporting documentation.
>
> 6. Discloses restricted access codes or other restricted access information to unauthorized persons.

According to Burbank, the court erroneously failed to consider the allegations in the complaint that state a claim for a violation of subd. 6 and instead limited its analysis to the allegations contained in paragraphs 14 and 15 of the complaint, which were labeled "Computer Crime of Sokolowski."

¶42 The circuit court concluded the complaint stated a claim for a violation of WIS. STAT. § 943.70(2)(a)4, which prohibits "willfully, knowingly and without authorization ... [t]ak[ing] possession of data, computer programs or supporting documentation." The court apparently focused on the allegations in paragraph 14 that Sokolowski "willfully, knowingly and without authorization of Burbank took possession of computer data from Burbank's computer system in the form of a printout, which he and United Grease have used to improperly solicit business away from Burbank." (Paragraph 15 alleged that this conduct violated WIS. STAT. § 943.70(2) but did not specify the particular subdivision under paragraph (a).) The court then concluded that the undisputed evidence established that Sokolowski took possession of data containing Burbank's customer information while employed by Burbank and with Burbank's authorization. Burbank does not pursue on appeal its argument under subd. 4 but now focuses solely on subd. 6, which the court did not consider because it concluded this violation was not adequately pleaded.

¶43 As Burbank implicitly concedes, the circuit court was correct to begin with an analysis of the complaint, because the initial step of the summary judgment methodology is to examine the pleadings to determine whether the plaintiff has stated a claim for relief. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). In doing this analysis, the facts pleaded and all reasonable inferences arising from the factual allegations are accepted as true. ***Prah v. Maretti***, 108 Wis. 2d 223, 229, 321 N.W.2d 182 (1982). Burbank is

correct that in Wisconsin a civil pleading need not define issues or state detailed facts; only "fair notice" of what the claim is and the grounds upon which it rests is required. ***State ex rel. Adell v. Smith***, 2001 WI App 168, ¶¶5-6, 247 Wis. 2d 260, 633 N.W.2d 231. It is also true that when a court analyzes a complaint to determine whether it states a particular claim for relief, the label given the claim in the complaint is not dispositive. ***Jost v. Dairyland Power Cooperative***, 45 Wis. 2d 164, 169-70, 172 N.W.2d 647 (1969). Thus, we agree with Burbank that allegations not contained in the paragraphs labeled "Computer Crime of Sokolowski" are properly considered to determine whether the complaint states a claim for relief under any subdivision of WIS. STAT. § 943.70(2)(a); we also agree that the failure to specify a particular subdivision is not fatal.[15] However, we nonetheless conclude that the allegations on which Burbank relies do not state a claim for a violation of § 943.70(2)(a)6.

¶44 Burbank relies on these allegations in the complaint to state a claim for a violation of WIS. STAT. § 943.70(2)(a)6:

> 10. Sokolowski took information he received from Burbank's customer database and entered or directed someone to enter that information into United Grease's computer database.
>
> 11. Sokolowski and United Grease are using the valuable and confidential information obtained from Burbank to solicit customers of Burbank to do business with United Grease.

[15] This assumes, of course, that Burbank timely presented to the circuit court its argument that allegations other than those in paragraphs 14 and 15 stated a claim for violations of WIS. STAT. § 943.70(2)(a). From our review of the record, it appears that Burbank argued violations of § 943.70(2)(a)4 and 5 in its main brief on summary judgment, and subds. 3, 4, 5, and 6 in its reply brief. Apparently the circuit court did not rule that Burbank's argument based on subd. 6 was untimely, and we therefore address it.

> 12. As a result of the illegal and unauthorized use of confidential information belonging to Burbank, Sokolowski and United Grease have succeeded in diverting substantial customer relationships away from Burbank, resulting in loss of profits to Burbank.

¶45 According to these allegations, Sokolowski took possession of Burbank's computer data without authorization and used it in an unauthorized manner. However, under no reasonable construction of these allegations do they amount to a "disclosure of restricted access codes or other restricted access information." WIS. STAT. § 943.70(2)(a)6. Burbank is implicitly asking this court to construe "access codes or other restricted access information" to include any computer data, but that is not a reasonable construction of the statute. The phrase "[a]ccess codes or other restricted access information" plainly refers to codes, passwords, or other information that permits access to a computer system or to programs or data within a system; the phrase does not refer to the system, program, or data accessed. Thus, subd. 6 plainly does not prohibit disclosure of data that is obtained as a result of using a restrictive access code. As we have mentioned above, subd. 4 does prohibit taking possession of data without authorization, but neither subd. 6 nor any other subdivision prohibits disclosure without authorization of data that is obtained with authorization.

¶46 Although we have, consistent with summary judgment methodology, first addressed whether the complaint states a claim for relief for a violation of WIS. STAT. § 943.70(2)(a)6, we also conclude that no evidence shows a violation of subd. 6. That is, the deficiency is not only a pleading deficiency but also a lack of any proof that Sokolowski violated subd. 6. For both these reasons, Burbank is not entitled to summary judgment that Sokolowski violated § 943.70(2)(a)6 nor is it entitled to a trial on that issue. We conclude the circuit court correctly granted summary judgment in Sokolowski's favor on Burbank's claim under § 943.70(2).

By the Court.—Order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

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BURBANK GREASE SERVICES LLC

Petitioners,

vs. Case No. 02 CV 2397

LARRY SOKOLOWSKI,

Respondent.

****

PROCEEDINGS: ORAL DECISION

DATE: December 1, 2003

COURT: Circuit Court Branch 5
The Honorable Diane M. Nicks,
Circuit Court Judge, Presiding

APPEARANCES: MIKE HERMES, Attorney at Law, appeared on behalf of the Petitioner: to-wit, BURBANK GREASE SERVICES, LLC.

STEPHEN J. EISENBERG, Attorney at Law, appeared on behalf of the Respondent: to-wit, LARRY SOKOLOWSKI.

MARK FUHRMAN, Attorney at Law, appeared on behalf of the Respondent: to-wit, UNITED GREASE, LLC and UNITED LIQUID WASTE RECYCLING, INC.

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Nadine M. Ripp, Official Court Reporter

P R O C E E D I N G S

THE CLERK: Burbank Grease Services v. Larry Sokolowski, 02 CV 2397.

THE COURT: Appearances?

MR. HERMES: Your Honor, for the plaintiff, Burbank Grease Services, LLC, Mike Hermes from Metzler & Hager, SC.

MR. EISENBERG: Larry Sokolowski appears by Attorney Steven Eisenberg.

MR. FUHRMAN: United Grease LLC and United Liquid Waste Recycling, Inc. by Attorney Mark Fuhrman.

THE COURT: This was the time set by the Court for an oral decision regarding the motions for summary judgment filed by both parties in this case, and I've had an opportunity to review the submissions of the parties. I will advise you right now that there is one matter I am not going to rule on today, but I'll give you the date for the ruling and it won't be, won't be far off and you can appear by telephone if you wish for that since it will be a short hearing.

THE CLERK: December 11 at 1:00.

THE COURT: All right. All right. To begin with, I'm going to file a written standard of review. I'm not going to review it with counsel at this time. However, I'm going to give counsel each a copy of the

standard of review. You've all correctly stated it in your briefs. It's well established. It's not a subject of controversy and I really can't see wasting everyone's time repeating what is a well established and uniformly agreed upon standard of review for summary judgment, but I do want to make a record of the standard that I'm following.

I'm going to take the causes of action I believe in the order in which they are pled by the plaintiff, the first being computer, alleged computer crime by Mr. Sokolowski under Section 943.70. Specifically the allegation in the complaint is that Mr. Sokolowski willfully, knowingly and without authorization of Burbank took possession of computer data from Burbank's computer system in the form of a printout which he and United Grease have used to improperly solicit business away from Burbank. That's paragraph 14. The corresponding provision in the criminal statute is, "Takes possession of data, computer programs or supporting documentation willfully, knowingly, and without authorization."

The pleadings, the pleadings certainly track the statute and the pleadings are adequate, however, after reviewing the parties' submissions, I'm going to grant Sokolowski's motion for summary

judgment on this issue. I do find that it is undisputed that while he did knowingly -- willfully and knowingly I guess take possession of the data, he was authorized to take possession at the time he took possession, and there's really no testimony that he wasn't authorized.

I think in at least one of the plaintiff's reply briefs they conceded that at the time he took these items, he had the authority to take them. He was employed. He was working on the material at home. Other people did the same thing. It was, the statute does not require some specific authorization. It requires a, sort of a general authorization or rather to the contrary, it requires that someone does something without authorization. I think the facts in this case support the conclusion that Mr. Sokolowski had authorization at the time he took the information in question from the premises.

The statute does not appear to prohibit continuing possession if the possession was originally authorized and there is no evidence that Burbank ever, for example, in the course of an exit interview sought the return of this information during the time or at the end of employment or at any time prior to the end of employment. They perhaps were unaware of the fact

that he had it, but that isn't the same as, again, withdrawing the authorization that he had to remove the property.

In addition, I note this is a, this is computer crime and I think it does not cover any document removed from a premises that were at some time in a computer because almost everything is generated on a computer this day. I think it refers to taking without authorization from that, from that computer and, again, the taking from the time when the item was taken from the computer and taken from the premises of Burbank, I think the record is clear that there was authorization.

There are arguments I believe under, or some argument under sections, some of the other sections of that statute but they weren't, that's not what was pled. The motion for summary judgment is based on the pleadings. It follows from the pleadings and the pleadings only allege unauthorized taking and so I don't think it's appropriate for me to even comment on arguments about claims that were not part of the pleadings, that were not the actual specific allegation in the pleading.

The next two claims are claims that I'm going to give my decision on at the next opportunity.

I will just advise the parties that I reviewed the briefs. I am struggling given the lack of direct Wisconsin precedent on the preemption argument. I want more time to review that before I issue a decision on that. Both breach of duty claims are subject to argument that they're preempted. I think it's an interesting argument and I haven't resolved in my mind the way I'll go on that.

The next issue is whether either party is entitled to summary judgment with regard to misappropriation of trade secrets by Sokolowski and United Grease. The statute of course is Section 134.90 of the Wisconsin Statutes. Trade secrets include formula, patterns, compilation, programs devices, methods, techniques or processes to which all of the following apply. "The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use. The information is subject to -- is the subject of efforts to maintain its secrecy that are reasonable under the circumstances."

Misappropriation provides: "No person, may misappropriate or threaten to misappropriate a

trade secret by doing any of the following." Again, the relevant provision I think is just, "Disclosing or using without express or implied consent a trade secret of another if the person did any of the following: Acquiring it under circumstances giving rise to a duty to maintain secrecy or limit its use."

The complaint alleges disclosure of trade secrets to another. That the information derived had actual or potential economic value from not being known to or readily ascertainable by proper means, and that the plaintiffs sought to maintain the secrecy of the information. These basically cover the elements that -- the complaint covers the elements under Section 134.90(2) and the complaint is adequate. Obviously the response, the answers are adequate to raise issue.

Proceeding then to summary judgment and, again, I'm going to grant summary judgment in favor of the defendants. Again, after reviewing the submissions, I do not find any independent, economic value derived from the fact that the information in Mr. Sokolowski's possession was not generally, not readily ascertainable by proper means by, to other persons -- or generally known to other persons. Again, you know, we're dealing with the kind of

information I think that can be readily recreated. That's the issue. This is, again, not a case of a half a dozen or 40 or 50 private individuals who otherwise couldn't be found to be customers. These are, these are restaurants and other users of grease that can be readily ascer -- can be readily identified. They can be readily approached. There is no reason, there is nothing that, that contradicts the information that they can be asked about rates and they can be and are eager to generate competition and eager to have someone competing for their business and willing to give that information and they know that information and so I, I do not find, again, that, that the critical element of not being readily ascertainable by proper means by other persons is met.

Here I looked at the second case submitted for the second language pattern developed by our courts. Must be information, including a formula, pattern, compilation, program, device. Fine, that prong is met. Independent economic value available from only one source. And, again, I just, I don't find that that element is met by the types of information that is, that is involved in this case.

The Wisconsin precedent does, which is really not generally embracing customer lists as trade

secrets, recognizes they could be a trade secret but, again, it says that, the definition or the specification being the language in *Minuteman*, "In certain sectors of the business community identical or nearly identical products and/or other services are sold to a small, fixed group of purchasers. In such an intensely purchaser-oriented market, a supplier's customer list could well constitute a trade secret."

I think the example that I, the best example of that that I saw in the course of the materials that I reviewed, was the list of individuals who were using particularly, I think it was a pharmacy, you know, the kind where how else would you find someone who might be interested in these types of drugs if you didn't begin with the fact that they had these issues or they had purchased similar drugs in the past, you couldn't pick them out of the general population, you couldn't survey 250,000 people, the list would be critical to getting to the customers.

This is quite the opposite I think. The list is, the list is a subset of all restaurants and all restaurants are pretty, restaurants of grease are pretty readily identifiable.

Then there is a question of, you know, sort of different from the, from the list. The

customer list is the driver route but I, I cannot find that has any independent economic value. It has some, had some value perhaps at one time, maybe not anymore. Burbank has no independent value. There is no basis for concluding it has value to United Grease, value to Sokolowski. It is too specific to the organization and to changing facts and to a very large, large organization such as Burbank but, again, without a repetition of the exact same customers on the exact same lines or something similar, it has no independent economic value.

In addition, while it's a somewhat closer call, I do not think the evidence supports a conclusion that Burbank made reasonable efforts to maintain secrecy. The items that are listed are the passwords, management signing a code of conduct which had a provision of confidentiality, and a handbook I believe. However, the record is pretty clear that a number of employees had substantial access to and worked with Burbank's customer information for years and were totally unaware of any confidentiality directions or written rules about disclosure known certainly by Mr. Sokolowski but certainly not by many others who were not required to sign nondisclosure agreements. The others, such as other salesmen and

such as employees similar to Sokolowski had not signed a code of conduct. Were not- - They were authorized to take the information home. The company knew they were working on the information from their home. There was no, there was no like checking out of the information that there might be if it really was a secret so, you know, the company wanted to know if the information was out and then when it came back in, that it was back in. There wasn't any process like that. There was- - There was, again, reference to a non-disclosure statement but nobody was required to sign it. At the time of termination there was not an exit interview. There wasn't any inquiry about whether or not there was any company material that had been legitimately removed from premises that had not been returned.

So in light of all those factors, it seems to me that this information is being treated just like business information. I mean it's on the premises, and you have to use a password to get at it, but I, frankly, don't have, know of any computer program that you don't have to have a password to get into. I don't think it signifies a desire to maintain the level of secrecy as required by the protection of the statutes.

Again, I have to say sort of an almost kind of casual approach about the movement of this information within the, within the company itself and outside of the company undermines any claim and that, that there was a reasonable effort to keep the information secret. So for those reasons, I do not find that the information in question was a trade secret and, consequently, I grant the defendants' motion for summary judgment in regard to the trade secret claim.

The next is tortious interference with business relationships. The elements of that are set forth in Section 768 and *Dorr v. Sacred Heart Hospital,* 228 Wis. 2d 425. "The elements of tortious interference with a contract are: The plaintiff had a contract or prospective contractual relationship with a third party; the defendant interfered with the relationship; the interference was intentional; a causal connection exists between the interference and the damages, and the defendant was not justified or privileged to interfere."

And then in an, in an analysis of that, the Court is to review, first of all, factors in determining whether the interference is improper, including the nature of the actor's conduct, motive,

interests of the other, with which the actor's conduct interferes, interest sought to be advanced, social interests in protecting the freedom of action of the actor and contractual interest of the other, proximity or remoteness of the actor's conduct to the interference, and relations between the parties and, and, in addition, Section 768 which provides that, "One who intentionally causes a third party not to enter into a prospective contractual relationship with another who is his competitor or is not -- or not to continue an existing contract terminable at will does not interfere improperly with the other's relation if the relation concerns a matter involving competition between the actor and the other; the actor does not employ wrongful means; his action does not create or continue unlawful restraint of trade; and his purpose is at least to, in part to advance his interest in competing with the other."

Again reviewing the pleadings, the pleadings are adequate to allow the Court to proceed to the next stage. However, when I reach the summary judgment stage, I find, again, that I'm going to grant summary judgment again for the defendants. The contracts at issue are terminable at will contracts -- implied contracts terminable at will. The plaintiffs,

the quote interference was for the legitimate purpose of competing. So the relation concerns a matter involving competition between the actor and the other. It's still required that the find -- that the actor does not employ wrongful means.

While there is some variance in the language used by the courts to describe improper means, the general principle with improper, with regard to improper means, are means that would move people in the defendant's direction for reasons that are unrelated to economic efficiency. Such means include force, violence, fraud. There- - In this case I don't find that there are improper means used by the defendants in the, in their efforts to compete.

There certainly is, again, no physical force, violence, fraudulent misrepresentation. The only allegation of impropriety has to do with breach of duty. However, I do not find that the breach of duty allegation in this case is sufficient. First, I haven't found breach of duty and if, in fact, I find that that particular claim is preempted, that issue is going to wash away completely, but the breach of duty allegation I think does not reach the threshold of being an improper means, and it was something that deprives the defendants of the competitor's privilege.

As the Court said in *Liebe,* L I E B E, *v. City Finance*, at 98 Wis. 2d 10, 16 and 1980. "Such improper means within the principles of the Restatement are coercion by physical force, or fraudulent misrepresentation."

There is an allegation of fraudulent misrepresentation. However, it is, again, something that's late in its arrival on the scene. Reviewing the, the complaint, the only, the only basis in the complaint is the alleged breach of the agency duty. At Paragraph 43, "Defendants employed wrongful means to induce or otherwise cause customers to discontinue their relationships or terminate their contracts with Burbank in that Sokolowski and United Grease misappropriated confidential and trade secret information on Burbank and took advantage of Sokolowski's loyalty and breach of duty to Burbank." So there is no allegation of misrepresentation in this complaint. I don't know if it shows up in the final reply brief or sometime before that, but the fact is it's not in the complaint, and I think, again, we have to again base our grant of judgment on claims that have been pled.

The final claim is a conspiracy claim under Section 134.01. And, again, I find that the

pleading is adequate, however, I don't find any evidence of a conspiracy. There may be a legal argument that, you know, a corporation and agency can't constitute conspiracy, but I think a conspiracy requires agreement. The specific conspiracy alleged here is a conspiracy to deprive Burbank of its customers by using trade secrets and confidential information. I just found that there are no -- the trade secret law does not apply concerning the pricing structure that Burbank had in place with its various customers. A conspiracy requires some agreement to, again, wrongfully use that information and I don't find evidence of a conspiracy. Again, the illegal dumping is apparently whether the plaintiff completely abandoned the idea that the use of the other information was a conspiracy. I don't know, but they, again, move into illegal dumping and this is all not pled. The pleading is once again, strictly related to using trade secret or confidential information.

Conspiracy also requires a showing of willfulness or malice. Malice being "harm malevolently for the sake of harm in and of itself, not merely as a means to further some end legitimately desired." That's from *Maleki v. Fine-Lando Clinic,* 162 Wis. 2d 73, Page 88, 1991.

I do not find that, the evidence of malice in any of the submissions as well and those are, are the fact of agreement, the malice, the -- those are all requirements of the conspiracy claim. I don't- - I'm granting summary judgment for the defendant on all of those claims.

That leaves two claims, the breach of agency and the aiding and abetting. The breach of agency claim which may or may not be resolved by the ruling on preemption that I'll give you on the 11th. We're also set for a scheduling conference today.

MR. EISENBERG: I would request we wait until the 11th and see what occurs there if we could. If the Court doesn't grant summary judgment, we could schedule a scheduling conference on that date if that would be acceptable.

THE COURT: All right.

MR. HERMES: That makes sense.

THE COURT: All right.

MR. EISENBERG: And since I'm here, can I come up for that with all of the others on the phone? Is it all right if I appear?

THE COURT: You may appear.

MR. EISENBERG: You'll be here or in your chambers? I'll find you.

THE COURT: I don't know yet, depends what's going before and after and how many people are here.

MR. EISENBERG: I'll wait to file an order until after that hearing. Is that okay with the Court?

THE COURT: That's fine.

MR. HERMES: Your Honor, I will have to appear by phone that day. I have other stuff scheduled in Green Bay so I would request- -

THE COURT: That will be fine.

MR. HERMES: - -to appear by phone.

THE COURT: That will be fine. There obviously isn't going to be any argument or anything. It's just going to be the remaining issue.

MR. EISENBERG: So the court, I won't be sending an order or anything. We'll wait until after the 11th. I'm sorry, go ahead.

MR. HERMES: Thanks, Steve. The one issue on the trade secret claim, you mentioned specifically the customer list, you mentioned specifically the driver routes. There was also the discussion of an industrial account spreadsheet that contained internal profit information. Has the Court made a specific finding on that as well?

THE COURT: I think I'd have to go back

to- - I think I did but I didn't address it in the, in my notes. I know the customer- - Well, let me ask you this. Was this also 1998 information? I've got three or four documents.

MR. HERMES: I don't know if it's clear from the record what year it's from, Your Honor.

THE COURT: Because one of the facts that I think undermined any claim of value was how dated the information was. I know certain information was 1998 information, and I'm not clear right now whether or not that was part of the 1999 packet. I know it was included in, the spreadsheet was included in Mr. Fuhrman's submissions I believe.

MR. FUHRMAN: Right. I don't have- - I don't have those with me.

THE COURT: Why don't we just- - I will address that item. I made my ruling.

MR. HERMES: I see where you're going.

THE COURT: I know it was there and I made my ruling with it in mind, but I didn't address it specifically today and I will make specific remarks about that.

MR. HERMES: Thank you.

THE COURT: All right. Then we'll have a phone or personal appearance, whichever counsel

desires, for the remaining matters, and I do have, you know, this is just the standard of review. I'm going to file it and it will be part of the record that way. That's all then. We're adjourned.

(Off the record at 11:42)

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STATE OF WISCONSIN)
) SS
COUNTY OF DANE)

I, Nadine M. Ripp, a Circuit Court Reporter, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes, taken at said time and place before the Honorable Diane M. Nicks, a Circuit Court Judge presiding in and for the County of Dane, State of Wisconsin.

Nadine M. Ripp, RMR
Official Court Reporter

Dated at Madison, Wisconsin, this 8th day of December, 2003.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

STATE OF WISCONSIN : CIRCUIT COURT : DANE COUNTY

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BURBANK GREASE SERVICES LLC

Petitioners,

vs. Case No. 02 CV 2397

LARRY SOKOLOWSKI, et al,

Respondents.

****

PROCEEDINGS: ORAL DECISION

DATE: December 11, 2003

COURT: Circuit Court Branch 5
The Honorable Diane M. Nicks,
Circuit Court Judge, Presiding

APPEARANCES: MIKE HERMES, Attorney at Law, appeared by phone on behalf of the Petitioner: to-wit, BURBANK GREASE SERVICES, LLC.

STEPHEN J. EISENBERG, Attorney at Law, appeared on behalf of the Respondent: to-wit, LARRY SOKOLOWSKI.

MARK FUHRMAN, Attorney at Law, appeared by phone on behalf of the Respondents: to-wit, UNITED GREASE, LLC and UNITED LIQUID WASTE RECYCLING, INC.

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Nadine M. Ripp, Official Court Reporter

PROCEEDINGS

THE CLERK: Burbank Grease Services, LLC v. Larry Sokolowski, 02 CV 2397.

THE COURT: Could we state the appearances for the record, please.

MR. HERMES: Yes, Your Honor. Plaintiff, Burbank Grease Services, appears by Attorney Michael Hermes.

MR. EISENBERG: Larry Sokolowski does not appear in person but appears by Attorney Stephen Eisenberg in person.

MR. FUHRMAN: Defendant, United Grease LLC and United Liquid Waste Recycling, Inc., appears by Attorney Mark Fuhrman.

THE COURT: All right. This was the time set by the Court for a decision on the remaining two counts in the complaint brought by Burbank Grease. Before I proceed with that decision, I -- at the last hearing I indicated that I would make a more complete record with regard, with regard to the spreadsheet that was, that Mr. Hermes questioned about.

I did, in fact, review the attachments and that spreadsheet and I'm correct, it also contains what I think is dated and not particularly useful information, 1998 records, you know, which if they had

any value by 2001, I think had had no particular value.

In addition, I will note that that document along with other items that were the subject of this action appear to be ordinary business records, records that are put together in the course of the business in order to be able to conduct business and keep a record of business rather than some creative marketing plan or secret formula or other of the types of materials that I think the Trade Secret Law was designed to create a property right in. And I would contrast the kinds of information we have in this case with the kinds of information shown in other cases in the courts, which, again, are the product of effort and industry and financial investment.

One of the more recent cases I reviewed was the seventh circuit case following the *Betts* case of the, where the

defendant -- the plaintiff and the defendant were both involved in the investment of particular olive oil and a marketing plan for a particular olive oil and there was a tremendous amount of money both in the development of the particular formula for the olive oil, the packaging, and then the communications in order to obtain exclusive rights. One of the

defendants in that case is the wonderful, Giuseppe Grappolini, who, in fact, worked in the development of all the secret information and then walked off with the exclusive rights and duplicated the information and used all of the, again, very expensive to develop property information. This is- - These I think are regular business records. I don't, they don't have the characteristics I think of the types of records that are trade secrets.

There still remains a question of whether breach of agency, a breach of fiduciary duty claim under the common law lies or whether it's displaced or preempted by Section 134.90. The statute that we're concerned or the section we're concerned with is, except as in Paragraph B, Section 134.90, "displaces conflicting tort law, restitutionary law and any other law in the state providing civil remedy for misappropriation of a trade secret."

(B) provides, "This section does not affect any of the following: 1 is a contractual remedy, whether or not based upon misappropriation of a trade secret. 2 is any civil remedy not based upon misappropriation of a trade secret, and, 3 is any criminal remedy, whether or not based upon a misappropriation of a trade secret." There is no

Wisconsin precedent on point with this issue. Our Supreme Court has said in *World Wide Prosthetic Supply, Inc. v. Miklusky,* 251 Wis. 2d 45, 55, a 2002 decision, that the Court is proper to look at decisions of other jurisdictions interpreting the Uniform Act.

The defendants argue that the plaintiffs breach of agency, aiding and abetting breach of agency, interference of contract, and conspiracy claims are all preempted. In, in light of the ruling that I made regarding the remaining counts, it is not necessary for me to rule regarding preemption on the interference with contract and conspiracy claims. Defendants are relying on the Illinois case of *Thomas & Betts v. Panduit,* 108 F.Supp.2d 968, 971, a northern district of Illinois case in the year 2000, where the Court held that a claim of breach of fiduciary duty displaced, was displaced by an almost identical Illinois Trade Secret Act where the breach alleged was misappropriation of a trade secret.

In response to the argument in that case that preemption was improper if the confidential information did not constitute a trade secret -- or may not constitute a trade secret, the Court stated,

"this theory would render Section 8 meaningless, for it would forbid preemption of state law claims until a final determination has been made with respect to whether the confidential information at issue rises to the level of a trade secret."

Then, adopting the following rationale for a 1999 Illinois case, *Learning Curve Toys, L.P. v. Playwood Toys, Inc.*, adopting that court's rationale, they quoted the statement, "Unless the defendants misappropriated a (statutory) trade secret, they did no legal wrong. Nothing turns on whether we call these trade secrets or trade secret, proprietary or confidential information."

In *Thomas & Betts*, they recognize that a company may have difficulty establishing that items that they consider to be valuable to them are trade secrets, but they point out at Page 973, that there is a remedy for protection of these items and this is through a contract, so a nondisclosure contract, and, therefore, if there is misappropriation of items covered by the contract, there is indeed a remedy. Obviously that, the plaintiff in this case did not engage in a contract with defendant, Sokolowski, or the co-defendant in this case, and so that remedy is not available to them.

Thomas & Betts is followed by *Bliss Clearning Niagara, Inc. v. Midwest Brake Bond Co.*, that's 270 F.Supp.943, 948, that's a Southern District of Michigan case, and the year, in the year 2003. I reviewed that case because it actually reviews all of the cases that follow the *Thomas & Betts* line of thinking and the case that follows that -- *Micro Display* -- line of thinking, that court, like *Thomas & Betts*, has concluded that the Trade Secret Act preempts breach of fiduciary duty at least where that breach is dependent on misappropriation of information. It discusses the purpose of the Trade Secret Act using the following language, "'to codify all the various common law that it intends -- to codify all of the various common law remedies for theft of ideas,' and that 'plaintiffs who believe their ideas were pilfered may resort only to the ITSA,'" that's Illinois Trade Secret Act, "'that ITSA does not simply preempt common law claims for which misappropriation of a trade secret is an element. Rather the provision eliminated common law claims based on conduct which might support an ITSA action. In other words, if the operative facts are arguably cognizable under the ITSA, any common law claim that might have been available on those facts in the past

is no longer available in Illinois.'" That's, again, the Michigan court quoting rationale that they found persuasive and they followed the Illinois ruling in *Thomas v. Betts*.

The other- - There are plenty of cases. They're stated by the plaintiff. One of them is *Micro Display v. Axtel*, 699 F.Supp.202, 205, District Court in Minnesota in 1988, and that court held that, "Only that law which conflicts with the Minnesota Uniform Trade Secret Act is displaced. Conflicting law is that law dealing exclusively with trade secrets. To the extent that an action exists in a commercial area not dependent on trade secrets, that cause continues to exist."

I note that Section 134.90 directs that Trade Secret Acts should be "applied and construed to make uniform the law relating to misappropriation of trade secrets among states enacting substantially identical laws." There is no way I can construe it to make my decision uniform with those of all the other states. There is a conflict, and I just -- I note this because neither party I think has made a showing one way or the other that would operate to bring a trade secret into substantial uniformity -- my interpretation of it -- into substantial uniformity

with other jurisdictions.

Looking at Wisconsin law, trying to understand not what Illinois did or what Michigan did but what Wisconsin, the Wisconsin appellate courts will do, I did go back to a lot of trade secret cases, again, with an understanding -- attempt to understand what the parameters of this law is and what the ultimate relationship of the preemption provision is to the common law tort of breach of fiduciary duty. I found that *Abbott* and *Zeeland* and Corroon & Black are all helpful in that area.

In the *Abbott* case, and this is -- let me get the full cite, *Abbott Laboratories v. Norse Chemical Corporation, et al.*, 33 Wis. 2d 445, it's a 1967 case, the Court said at 455, "The law of trade secrets has developed to deal with a particular problem in American industry -- employee mobility among key employees of an industrial concern. In today's economy there is tremendous demand for highly trained technical, engineering, and research personnel. When an employee changes jobs, 'it is inevitable that some of the employee's previously acquired knowledge will be made available to the new employer. It is at this point that the problem arises -- where do the trade secrets begin and the employee's

intellectual tools of the trade end?'"

And I interpret that paragraph as saying that the Trade Secrets Law is developed to address employee's use of information gained in one employment at their, at their next employment. The Court talks about the competing policies and notes that one policy is to enforce increasingly higher standards of fairness on commercial morality in trade, and the other quality is the industrial system of a free economy encouraging technological advance is vital to the maintenance of our economic system and industry productivity.

On the one hand, it can be said if the employer's trade secrets are not protected from appropriation by the employee or unscrupulous, research and development may be impaired. No employer will be, and here is, again, some language I found significant, "willing to spend large sums of money on research and development of new ideas, processes or methods if these can be taken and used by others with impunity. On the other hand, if potential competitors are intimated and the dissemination of ideas, processes and methods is impaired, competition is fettered and the public is injured. The courts have sought to balance these conflicting, yet fundamental,

interests, but have done so with different results."

And, again, my -- my perception of the Trade Secret Law is that it was developed directly in response to employees leaving one employer, going to another employer with information, attempting to, to develop a law that addressed what rights should be protected. And then, in the next -- the next case along the same line is *Zeeland, Zeeland v. Sandas,* that's 84 Wis. 2d 202, 267 N.W.2d 242, it's a 1978 case by our Supreme Court, in which they state, "Restatement of Torts, in the introductory portions to sec. 757, discusses the rationale of trade secret protection, and it analogizes, to a degree, trade secrets to patents and copyrights. Matters will be given the status of trade secrets for the same reason that patents and copyrights are afforded special protection, because it is the public policy assumption -- because it is the public policy assumption that, by giving special protection to inventors, authors, and composers, an incentive will be afforded to creativity and the benefits will inure to the general public. Basically, then, it is contrary to public policy to afford special protection to a restraint-of-trade mechanism where to do so does not give a special incentive for creativity that will inure to the

benefit of the public at large. Accordingly, it is contrary to public policy to afford protection to material which is generated in the ordinary course of a business." That, again, is the, the category of material that I think is involved in this case, and noting, again, the policy statement is contrary to public policy to afford protection to material which is generated in the ordinary course of business.

I'm going to review the elements of misappropriation under the Trade Secret Law and the breach of fiduciary duty that is alleged in this case. I find the elements of the two causes of action are substantially similar. The breach of fiduciary duty that's claimed in this case is misappropriation of confidential information. However, I have previously found, and reaffirm my finding, that the type of information involved was that which is generated in the ordinary course of business, not some especially creative or unique or expensive to create information.

So with that in mind, the final case that I thought provided significant information is the *Corroon* case. *Corroon v. Black* (sic), I think it's cited in both parties' briefs. *Corroon & Black-Rutters & Roberts, Inc., v. Hosch,* at 109 Wis. 2d 290, and, and that case, again, the Court stated

that, "public policy reasons militate against affording trade secret status to insurance agency customer lists. As we pointed out in *Van Zeeland:* '[C]ustomer lists are at the very periphery of the law of unfair competition, because legal protection does not provide incentives to compile lists, because they are developed in the normal course of business anyway.' 'The enforcement of a concept that one may not use trade secrets can only be justified as an unusual exception to the common law policy against restraint of trade.'" Again, noting from *Zeeland,* they state, "'[I]t is contrary to public policy to afford special protection to a restraint-of-trade mechanism where to do so does not give a special incentive for creativity that will inure to the benefit of the public at large.'"

I reviewed these cases. They, I think, give me a feeling for, and understanding of the law in Wisconsin regarding the level of protection that should be afforded to ordinary business information versus that special category of information which meets the standards of being trade secrets. I find that elements of the breach of fiduciary duty are essentially the same as theft of a trade secret, and I have concluded that in Wisconsin law, that the Trade

Secret Act preemption, a common law claim of breach of fiduciary duty where that breach of duty is misappropriation of business information, the Trade Secret Act establishes a level of a particular quality of information that should be protected against what might otherwise be a completely free enterprise. I think recognizing the breach of agency claim here would disregard the legislature's decision regarding the appropriate balance between competition and encouragement of development of beneficial trade secrets.

I recognize that summary judgment is a harsh remedy, however, I think there is ample support for it in this case. In addition, I did review a case in, again, in the Seventh Circuit, *Composite Marine Propellers, Inc., v. Van Der Woude,* and that's at 962 F.2d 1263, it's a Seventh Circuit case in 1992- - I have to look at something from there that, where the Court -- where the plaintiff succeeded in a claim all the way through trial and the Court ultimately reversed, citing language that I think is very peculiar to what our court said. First of all, recognizing, again, that the contractual remedies remain and -- well, I'm not going to bother quoting the case because it's not on point, but only to say

that, that my judgment, best judgment is that in Wisconsin, preemption does result in summary judgment to the defendants with regard to the breach of fiduciary duty, and for that reason, judgment will be granted for the defendant in both cases.

That I think concludes this case. Mr. Hermes, I imagine that maybe these issues will be decided in Wisconsin law in the future, and it will be easier for the next Judge who has to address them. I want to say, I thought the briefing in this case was excellent. The issues are, were significant and interesting and it's been an enjoyable experience, perhaps not for all of you, but certainly for me.

MR. EISENBERG: Shall I prepare an order, Your Honor?

THE COURT: Yes.

MR. EISENBERG: And I'll circulate it among all the parties and the five day rule- - I think if they have an objection to it, they'll notify the Court within five days?

THE COURT: All right.

MR. EISENBERG: Is that all right, guys?

MR. FUHRMAN: Yeah, that's fine.

MR. HERMES: Fine.

THE COURT: All right. And that concludes

our hearing then. Thank you all.

MR. EISENBERG: Thank you, Your Honor.

(Off the record at 1:31)

STATE OF WISCONSIN)

) SS

COUNTY OF DANE)

I, Nadine M. Ripp, a Circuit Court Reporter, do hereby certify that I reported the foregoing proceedings; that the same is true and correct as reflected by my original machine shorthand notes, taken at said time and place before the Honorable Diane M. Nicks, a Circuit Court Judge presiding in and for the County of Dane, State of Wisconsin.

Nadine M. Ripp

Nadine M. Ripp, RMR
Official Court Reporter

Dated at Madison, Wisconsin, this 17th day of December, 2003.

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

STATE OF WISCONSIN CIRCUIT COURT BRANCH ___ DANE COUNTY

BURBANK GREASE SERVICES, LLC,
a Wisconsin limited liability company
605 Bassett Street
DeForest, WI 53532,

Plaintiff,

v.

Case No. 02-CV- 02CV2397

Case Code No. 30303
Other Contracts

LARRY SOKOLOWSKI
707 Brook Street
DeForest, WI 53532,

UNITED GREASE L.L.C.,
a Wisconsin limited liability company
715 Morgan Street
Clyman, WI 53016,

and

UNITED LIQUID WASTE RECYCLING, INC.,
a Wisconsin corporation
N2797 Hwy. 26
Watertown, WI 53098,

Defendants.

COMPLAINT

Plaintiff, Burbank Grease Services, LLC, by its attorneys, Metzler and Hager, S.C., alleges as follows:

1. Plaintiff, Burbank Grease Services, LLC ("Burbank"), is a Wisconsin limited liability company, with offices located at 605 Bassett Street, DeForest, Wisconsin 53532.

2. Defendant, Larry Sokolowski ("Sokolowski"), is an adult resident of the State of Wisconsin, residing at 707 Brook Street, DeForest, Wisconsin 53532. Sokolowski was the Procurement/Territory Manager for Burbank and is now, upon information and belief, an officer and member of United Grease L.L.C.

3. Defendant, United Grease L.L.C. ("United Grease"), is a Wisconsin limited liability company, with its registered office located at 715 Morgan Street, Clyman, Wisconsin 53016.

4. Defendant, United Liquid Waste Recycling, Inc. ("United Liquid Waste"), is a Wisconsin corporation, with offices located at N2797 Hwy. 26, Watertown, Wisconsin 53098.

5. Burbank, in business since 1927, specializes in the collection and processing of restaurant, industrial and trap grease. The facility can process up to 4 million pounds of waste oils and greases. Storage and collection units are provided, along with the collection and/or trap pumping maintenance programs.

6. Sokolowski was hired by Burbank to serve and served in various senior management positions, the last being Procurement/Territory Manager.

7. As Procurement/Territory Manager, Sokolowski was responsible for customer service and direction regarding the procurement of raw materials for Burbank. One of his main duties was to maintain and monitor current accounts, develop new business, and to implement pricing and charge programs. Sokolowski had authority, without direct supervision, to negotiate prices, formulas for pricing, and terms with customers of Burbank. Sokolowski had access to information regarding Burbank's business as well as Burbank's customer database, which included, customer names,

addresses, telephone numbers, contact persons, type of service rendered, pricing formulas and price/charge list.

8. Burbank maintains information regarding its customers on a computer system. From this system, it is possible to generate reports listing customers by name, address, type of service, pricing arrangement and other criteria. Sokolowski had direct access to this information.

9. Sokolowski gave his notice of resignation and left the employment of Burbank on April 20, 2001. However, prior to his departure from Burbank, Sokolowski obtained a computer generated report from Burbank's computer system, containing valuable and confidential information about the business relationships Burbank had with its customers, including the customers' name, address, telephone number, contact person, customer service representative for the customer, type of service rendered, and the amount charged or paid to each customer for the service and/or product received.

10. Sokolowski took information he received from Burbank's customer database and entered or directed someone to enter that information into United Grease's computer database.

11. Sokolowski and United Grease are using the valuable and confidential information obtained from Burbank to solicit customers of Burbank to do business with United Grease.

12. As a result of the illegal and unauthorized use of confidential information belonging to Burbank, Sokolowski and United Grease have succeeded in diverting substantial customer relationships away from Burbank, resulting in loss of profits to Burbank.

COMPUTER CRIME OF SOKOLOWSKI

13. Burbank repeats and realleges, as if fully set forth herein, the allegations of paragraphs 1 through 12 of this complaint.

14. Sokolowski willfully, knowingly and without authorization of Burbank took possession of computer data from Burbank's computer system in the form of a printout, which he and United Grease have used to improperly solicit business away from Burbank.

15. Sokolowski's conduct in willfully and knowingly taking such data without authorization of Burbank violates Section 943.70(2), Wisconsin Statutes, and could subject him to the criminal penalties outlined in Section 943.70(2)(b).

16. Pursuant to Section 943.70(5), and Chapter 813, Wisconsin Statutes, Burbank is entitled to prevent or stop the disclosure of such data and its use by Sokolowski and United Grease.

BREACH OF AGENCY DUTY REGARDING SOKOLOWSKI

17. Burbank repeats and realleges, as if fully set forth herein, the allegations of paragraphs 1 through 16 of this complaint.

18. As Procurement/Territory Manager at Burbank, Sokolowski owed Burbank certain duties of an agent to a principal, including, a duty of loyalty and a duty not to disclose information material to his agency. Sokolowski stood in a confidential relationship to Burbank regarding the trade secrets and other confidential data provided to him as Procurement/Territory Manager at Burbank.

19. Sokolowski failed to disclose to Burbank, during the final days of his employment, his involvement in the business affairs of a competing enterprise which has now become known as United Grease L.L.C.

20. Because the business of United Grease is directly competitive with the business of Burbank, and because Sokolowski is performing the identical role for United Grease as he played for Burbank, it is inevitable that Sokolowski will disclose and/or use the confidential and trade secret information of Burbank for the benefit of United Grease.

21. The intentional conduct of Sokolowski constitutes a beach of agency duty to and confidential relationship with Burbank.

22. Burbank has been and continues to be harmed by the breach of duty of Sokolowski. The breach has proximately caused damage to Burbank, the extent of which is not presently known, but which is at least in part ascertainable to a reasonable degree of certainty.

23. The harm Sokolowski is causing to Burbank is substantial and irreparable, and Burbank has no adequate remedy at law.

AIDING AND ABETTING BREACH OF AGENCY DUTY REGARDING UNITED GREASE L.L.C. AND UNITED LIQUID WASTE RECYCLING, INC.

24. Burbank repeats and realleges, as if fully set forth herein, the allegations of paragraphs 1 through 23 of this complaint.

25. United Grease and United Liquid Waste were aware of the agency and other duties owed by Sokolowski to Burbank.

26. United Grease and United Liquid Waste intentionally and wrongfully lent substantial assistance to aid Sokolowski in breaching his agency and other duties to Burbank.

27. United Grease has been unjustly enriched and benefited, in an amount that has yet to be determined, by the breach of duty of Sokolowski. This breach has proximately caused damage to Burbank, the extent of which is not presently known, but which, on information and belief, is at least in part ascertainable to a reasonable degree of certainty.

28. Burbank has been and continues to be harmed by the breach of duty of Sokolowski, as aided and abetted by United Grease, and United Liquid Waste.

29. The harm Sokolowski is causing to Burbank is substantial and irreparable, and Burbank has no adequate remedy at law.

MISAPPROPRIATION OF TRADE SECRETS

30. Burbank repeats and realleges, as if fully set forth herein, the allegations of paragraphs 1 through 29 of this complaint.

31. Upon information and belief, Sokolowski has disclosed to United Grease, and United Grease has improperly acquired, secret information constituting customers, contacts and prices and formulas belonging to Burbank that is not readily ascertainable by proper means, and that derives actual and potential economic value from not being known to, and readily ascertainable by proper means, by others who might obtain value from its disclosure or use.

32. Burbank reasonably sought to maintain the secrecy of the information disclosed by Sokolowski through reasonable security practices.

33. On information and belief, Sokolowski and United Grease knew that the disclosure of secret information concerning the identity, location of and prices charged to Burbank's customers was wrongful.

34. Pursuant to Section 134.90 of the Wisconsin Statutes, Burbank is entitled to a temporary and permanent injunction enjoining United Grease and Sokolowski from making any use of the secret information of Burbank obtained through Sokolowski, and ordering Sokolowski and United Grease to return to Burbank, all documents and things containing or embodying the secret information.

35. Pursuant to Section 134.90 of the Wisconsin Statutes, Burbank is further entitled to a temporary and permanent injunction enjoining United Grease and Sokolowski from making further use of the secret information of Burbank in breach of obligation of Sokolowski to Burbank, including an order requiring the defendants to discontinue any activities aimed at diverting customer relationships away from Burbank.

36. Pursuant to Section 134.90 of the Wisconsin Statutes, Burbank is further entitled to a temporary and permanent injunction prohibiting Sokolowski from participating in any employment, consulting, or other business relationship of any kind with United Grease, or any other business directly competitive with the business of Burbank in which each of them participated, for a reasonable time.

37. Pursuant to Section 134.90 of the Wisconsin Statutes, Burbank is further entitled to recover monetary damages against Sokolowski and United Grease for the losses

Burbank has sustained and the unjust enrichment obtained by the defendants in an amount to be determined at trial.

38. Upon information and belief, United Grease and Sokolowski acted deliberately, willfully, and maliciously in obtaining and disclosing the secret information of Burbank. Pursuant to Section 134.90 of the Wisconsin Statutes, Burbank is entitled to an award of punitive damages against United Grease and Sokolowski in an amount to be determined at trial, and to an award of Burbank's reasonable attorneys fees in pursuing this action.

INTERFERENCE WITH BUSINESS RELATIONS

39. Burbank repeats and realleges, as if fully set forth herein, the allegations of paragraphs 1 through 38 of this complaint.

40. As of April 20, 2001, Burbank had contractual or other ongoing business relationships with businesses in the food industry in the Upper Midwest. Burbank had a reasonable expectation that absent improper interference by a third party, these business relationships would continue for the indefinite future.

41. Sokolowski and United Grease knew of the existence of these business relationships of Burbank.

42. On information and belief, Sokolowski and United Grease intentionally and improperly interfered with Burbank's business relationships with its customers by inducing or otherwise causing its customers to discontinue their business relationships with Burbank.

43. On information and belief, the defendants employed wrongful means to induce or otherwise cause customers to discontinue their relationships or terminate their

contracts with Burbank, in that Sokolowski and United Grease misappropriated confidential and trade secret information of Burbank, and took advantage of Sokolowski's loyalty and breaches of agency duty to Burbank.

44. As a proximate result of the conduct of the defendants, Burbank has sustained pecuniary losses in amounts that have not yet been determined, but are at least, in part, capable of ascertainment to a reasonable degree of certainty.

CONSPIRACY

45. Burbank repeats and realleges, as if fully set forth herein, the allegations of paragraphs 1 through 44 of this complaint.

46. United Grease, Sokolowski and United Liquid Waste have combined, associated, agreed and conspired to deprive Burbank of its customers by using trade secret and confidential information concerning the pricing structure Burbank had in place with its various customers, for the purpose of deliberately, willfully and maliciously injuring Burbank in its business.

47. United Grease, Sokolowski and United Liquid Waste have committed at least one overt act in furtherance of this conspiracy.

48. Burbank has been and continues to be harmed by the wrongful conspiracy of the defendants in violation of Section 134.01 of the Wisconsin Statutes.

49. As a proximate result of the conduct of the defendants, Burbank has sustained pecuniary losses in amounts that have not yet been determined, but are at least in part capable of ascertainment to a reasonable degree of certainty.

WHEREFORE, Burbank respectfully demands judgment as follows:

A. Temporary and permanent injunctive relief against each of the defendants and all persons acting in concert with them requiring that they:

(i) Surrender any and all documents or data, whether on paper, in computer files, or in any other media, that Sokolowski or anyone else associated in any way with United Grease, copied, removed, downloaded, or otherwise obtained from Burbank;

(ii) Cease and desist for a minimum of five (5) years from the entry of the Court's injunction from contacting, soliciting, or doing business with any businesses that were customers of Burbank at the time of Sokolowski's resignation from Burbank;

B. An accounting of all profits United Grease has derived since January 1, 2001, from its business dealings with businesses that were customers of Burbank as of the termination of Sokolowski's employment on April 20, 2001;

C. An award of damages compensating Burbank for the past, present, and future harm it has sustained as a result of the defendants' conduct in an amount that is yet to be determined;

D. An award of damages sufficient to deprive the defendants of any unjust benefit or enrichment from their wrongful conduct in regard to Burbank, in an amount that is yet to be determined;

E. An award of punitive damages in an amount sufficient to punish defendants for their intentional and willful wrongful conduct;

F. An award of the actual attorneys fees and costs reasonably incurred by Burbank in prosecuting this action; and

G. Such other and further relief as the Court may deem just and equitable.

DATED this 30th day of July, 2002.

METZLER AND HAGER, S.C.

By: _____

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 5 | DANE COUNTY

BURBANK GREASE SERVICES, LLC,
a Wisconsin limited liability company,

Plaintiff,

v.

LARRY SOKOLOWSKI;
UNITED GREASE, L.L.C.,
a Wisconsin limited liability company; and
UNITED LIQUID WASTE RECYCLING, INC.,
a Wisconsin corporation,

Defendants.

Case No. 02-CV-2397

Case Code No. 30303
Other Contracts

PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

This case is about an employee who knowingly and improperly took confidential information belonging to his employer before he terminated his employment relationship and subsequently used that information to solicit his former employer's accounts for his new business, a competitor of his former employer. The defendant, Larry Sokolowski (hereafter "Sokolowski"), has admitted to such actions in his deposition. Plaintiff, Burbank Grease Services, LLC (hereafter "Burbank"), merely asks that the court

grant summary judgment as to those causes of action listed in the complaint for which the supporting facts are not in dispute.

STATEMENT OF FACTS

Burbank is engaged in the business of collection and processing of used restaurant, industrial and trap grease. (Deposition of Brian Lodding at p. 8.) Defendant Sokolowski served in various managerial positions with Burbank between November of 1997 and April of 2001, including Director of Operations and Procurement/Territory Manager. (Deposition of Larry Sokolowski at 13, 17-18.) Upon resigning from Burbank, Sokolowski went to work for defendant, United Liquid Waste Recycling, Inc. (hereafter "United Liquid Waste"). (Sokolowski depo at 36, 43.) Shortly after joining United Liquid Waste, Sokolowski, along with the shareholders and officers of United Liquid Waste, including Robert Tracy, Sr., Robert Tracy, Jr., and Jason Tracy, formed United Grease, L.L.C. (hereafter "United Grease"). (Deposition of Robert Tracy, Jr. at 10-12; Sokolowski depo at 7.)

United Grease is in direct competition with Burbank, as it also provides services relating to the collection and processing of used grease. (Robert Tracy, Jr., depo at 15-16; Sokolowski depo at 7.) Sokolowski used confidential information belonging to Burbank, which he had obtained while employed with Burbank, in order to determine potential customers, pricing, and logistics which could be used to lure Burbank's clients to use United Grease services. (Sokolowski depo at 88; Deposition of David Kent Reinbold at 24; Affidavit of Deborah A. Bohlman.)

The complaint sets forth the following six separate claims: (1) computer crime by Sokolowski; (2) breach of fiduciary duties of an agent to his principal by Sokolowski; (3) aiding and abetting the breach of fiduciary duties by United Grease and United Liquid Waste (4) misappropriation of trade secrets by Sokolowski, United Grease and United Liquid Waste; (5) interference with business relations by Sokolowski and United Grease; and (6) conspiracy by Sokolowski, United Grease and United Liquid Waste.

SUMMARY JUDGMENT

"The purpose of the summary judgment procedure is not to try issues of fact, but to avoid trials where there is nothing to try." *Rollins Burdick Hunter of Wis., Inc. v. Hamilton*, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981). Pursuant to §802.08(2), Stats., summary judgment "shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wis. Stat. §802.08(2). Given the undisputed material facts listed above and the issues outlined below, summary judgment is appropriate in this case.

ARGUMENT

I. Sokolowski Willfully, Knowingly and Without Authorization from Burbank, Took Possession of Computer Data from Burbank's Computer System.

The Wisconsin Computer Crimes Act, as codified in Wis. Stat. § 943.70, provides criminal sanctions for those who commit offenses against computer data and

programs. "Whoever willfully, knowingly and without authorization...takes possession of data, computer programs or supporting documentation," or "copies data, computer programs or supporting documentation," may be subject to criminal penalties as provided in the statute. Wis. Stat. § 943.70(2)(a). In addition to the criminal sanctions, the statute also provides that "any aggrieved party may sue for injunctive relief under ch. 813," and "may sue for injunctive relief to prevent or stop the disclosure of information which may enable another person to gain unauthorized access to data, computer programs or supporting documentation." Wis. Stat. § 943.70(5).

It could not be more clear that Sokolowski has committed a computer crime as described in Wis. Stat. § 943.70(2)(a). Sokolowski has admitted that he willfully and knowingly copied and took possession of data belonging to Burbank. (Sokolowski depo, pp. 43-44, 65, 88, 93, 143-44.) Furthermore, Sokolowski never had permission to remove that information from the office, and definitely never had permission to keep that information at his residence or continue to possess it subsequent to his employment with Burbank. (Sokolowski depo, p. 51.) All elements of the cause of action exist and summary judgment should clearly be granted as to this claim.

II. As an Employee and Agent of Burbank, Sokolowski Breached His Duty of Loyalty to Burbank When He Used Burbank's Confidential Information Subsequent to the Agency Relationship.

The Wisconsin Supreme Court has cited as a basis for holdings related to breach of agency sections 387-98 of the *Restatement (Second) of Agency*, which set forth agents' fundamental duties with respect to their principals. See, *Hartford Elevator, Inc. v.*

Lauer, 94 Wis. 2d 571, 580, 289 N.W.2d 280, 284 (1980). Among these sections of the *Restatement*, is the agent's obligation not to use confidential information of the principal.

The continuing nature of an agent's obligation not to use confidential information of the principal, **even after the agency relationship has been terminated**, has been set forth in section 396 of the *Restatement (Second) of Agency*. Section 396 provides in part:

> Unless otherwise agreed, after the termination of the agency, the agent...;
>
> (b) has a duty to the principal not to use or disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business or the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent.

The purpose of such duties is to provide relief to those whose competitive advantage is compromised through the misappropriation of confidential information. Furthermore, "during the continuance of the agency [an agent] has a duty not to do disloyal acts looking to future competition" with the principal. *Restatement (Second) of Agency* § 396, cmt. a.

Sokolowski admitted in his deposition that he acquired Burbank's customer list while he worked at Burbank and retained the information after the termination of his employment with Burbank. (Sokolowski depo, pp. 43-44, 65, 88, 93, 143-44.) The information about Burbank customers was entered into the United Liquid Waste computer system and used to generate leads for sales calls. (Sokolowski depo at 88; Reinbold depo at 24; Affidavit of Debora A. Bohlman.) Not only did this information include the name, address and other contact information, but it also contained information about the type of service needed by each customer, as well as the prices being charged by Burbank for those services. (Sokolowski depo at 88; Affidavit of Debora A. Bohlman.) By taking the information and using it to generate sales leads, it cannot be disputed that Sokolowski has clearly violated this duty of loyalty to Burbank.

III. United Liquid Waste and United Grease Aided and Abetted Sokolowski's Unlawful Acts.

According to § 312 of the *Restatement (Second) of Agency*, a party who "intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." This view of third-party liability for involvement in an agent's breach of duty was endorsed by the Wisconsin Supreme Court in *St. Francis Sav. & Loan Assoc. v. Hearthside Homes, Inc.*, 65 Wis. 2d 74, 221 N.W.2d 840 (1974). Under the Court's ruling in *St. Francis*, intention to cause or assist a violation of duty is the controlling consideration, and there is no need to show malice or personal profit. *Id.*, at 81, 221 N.W.2d at 844. Consequently, a party that knowingly aids, abets, or joins a

fiduciary in the breach of his duty in order to make a profit becomes jointly liable with the fiduciary for such profits. *Id.*

As shown above, Sokolowski owed Burbank an unqualified duty to refrain from exploiting Burbank's sensitive customer and pricing information even after he left its employ. Sokolowski is an owner of United Grease, along with the owners of United Liquid Waste. (Robert Tracy, Jr., depo at 10-12; Sokolowski depo at 7.) In addition to being an owner of United Grease, Sokolowski is also the manager of the LLC. (Sokolowski depo at 7.) Sokolowski is solely responsible for the operation of United Grease. (Robert Tracy, Jr., depo at 21.) Sokolowski, while employed at United Liquid Waste and managing United Grease, violated his duty of loyalty to Burbank on numerous occasions to the direct financial benefit of both United Grease and Untied Liquid Waste. To hold Sokolowski responsible for the breach of his duty of loyalty to Burbank without also holding United Grease and United Liquid Waste responsible for intending to assist in the violation of that duty would be illogical and improper.

Although United Grease is a separate legal entity from United Liquid Waste, there is little actual separation between the two companies. The start-up of United Grease was funded by United Liquid Waste. (Robert Tracy, Jr., depo at 18.) No agreements were entered into between United Liquid Waste and United Grease for repayment of the initial capital contributions until well after this lawsuit was initiated. (Robert Tracy, Jr., depo at 23.) The financing and payments of United Grease and United Liquid Waste have come from the same bank accounts. (Robert Tracy, Jr., depo at 18.) United Grease has no employees of its own, but rather utilizes the employees of United Liquid Waste.

(Robert Tracy, Jr., depo at 22.) United Grease utilizes the computer network, building and facilities, and equipment of United Liquid Waste. (Robert Tracy, Jr., depo at 23-25.) It cannot be disputed, therefore, that United Liquid Waste was responsible for assisting in the violation of Sokolowski's duty of loyalty to Burbank, a violation which took place on United Liquid Waste premises using the United Liquid Waste computer system with information entered by United Liquid Waste employees.

IV. Sokolowski, United Liquid Waste and United Grease Have Violated the Uniform Trade Secrets Act.

In 1986, Wisconsin adopted the Uniform Trade Secrets Act ("UTSA"), which has been incorporated into the Wisconsin Statutes at § 134.90. The UTSA explicitly states that it "displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret." Wis. Stat. § 134.90(6)(b). When examining an alleged violation of Section 134.90, Stats., three questions arise: (1) does the material complained about constitute a trade secret under Section 134.90(1)(c), Stats.; (2) has a misappropriation occurred in violation of Section 134.90(2); and (3) if both of the above requirements are met, what type of relief is appropriate under Section 134.90(3) or (4). *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 853-54, 434 N.W.2d 773 (1989).

A. The Materials Taken By Sokolowski Constitute a Trade Secret Under Wis. Stat. § 134.90(1)(c).

The Wisconsin Statutes define a trade secret as information that (1) "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use," and (2) "is the subject of efforts to maintain its secrecy that are reasonable under the circumstances." Wis. Stat. § 134.90(1)(c). In *Minuteman, Inc. v. Alexander*, 147 Wis. 2d 842, 434 N.W.2d 773 (1989), the Wisconsin Supreme Court concluded that customer lists and lists of persons who have made inquiries as a result of advertising "may be eligible for trade secret protection under Section 134.90, Stats." *Minuteman*, 147 Wis. 2d at 845. The information that Sokolowski removed from Burbank about Burbank's customers, which Sokolowski, United Liquid Waste and United Grease together used to solicit accounts from Burbank, satisfies both statutory criteria, and therefore qualifies for protection as a trade secret.

1. The Information Was Economically Valuable, Being Neither Generally Known To Nor Readily Ascertainable Through Proper Means By Those Outside of Burbank.

Sokolowski acknowledged that the information regarding Burbank customers and Burbank's longstanding relationships with its clients was confidential information that Burbank would not want disclosed to competitors. (Sokolowski depo at 16.) Under the developing law of the Uniform Trade Secrets Act, while customer identities are not automatically protected as trade secrets, such protection is available "where the employer has expended time and effort identifying customers with particular needs or

characteristics," and disclosure of the list "would allow a competitor to direct its sales efforts to those customers who have already shown a willingness to use a unique type of service or product as opposed to a list of people who only might be interested." *Morlife, Inc. v. Perry*, 56 Cal. App. 4th 1514, 66 Cal. Rptr. 2d 731, 735-37 (1997) (applying Uniform Trade Secret Act as adopted in California). Other courts applying the Uniform Trade Secrets Act have come to the same conclusion. See, e.g., *Fred's Stores of Mississippi, Inc. v. M&H Drugs, Inc.*, 725 So. 2d 902, 908-11 (Miss. 1998) (upholding trade secret protection for a pharmacy's customer list under Mississippi's enactment of the Uniform Trade Secrets Act); *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936, 943-44 (Wash. 1999) ("a customer list is one of the types of information which can be a protected trade secret if it meets the criteria" of the Uniform Trade Secrets Act as adopted in Washington).

The facts here warrant trade secret protection for Burbank's list of customer accounts. The customer list contained information relating to the type of service provided to the customers, including the size of the grease trap, frequency of service, as well as pricing information. (Sokolowski depo at 88.) "Customer lists obtained through use of a business effort, and the expenditure of time and money that are not readily ascertainable and are kept confidential are given protection as a trade secret." *Allen v. Johar, Inc.*, 823 S.W.2d 824, 826-27 (Ark. 1992).

Protection under the Uniform Trade Secret Act has also been extended to information about the profitability of all or part of an employer's business. See, *Roton Barrier, Inc. v. Stanley Works*, 79 F.3d 1112, 1117-18 (Fed. Cir. 1996) (applying Uniform

Trade Secrets Act as adopted in Illinois to information about gross margins and sales data); *La Calhéne, Inc. v. Spolyar,* 938 F. Supp. 523, 527, 529 (W.D. Wis. 1996) (information concerning gross margin percentages and proforma income statements held protected under Uniform Trade Secrets Act as adopted in Minnesota); *Hydraulic Exchange and Repair, Inc. v. KM Specialty Pumps, Inc.,* 690 N.E.2d 782 (Ind. Ct. App. 1998) (plaintiff's daily compilations of profits and sales held protectible as trade secret under Indiana's Uniform Trade Secrets Act).

In this case, Sokolowski had access to Burbank's detailed information about the profitability of Burbank's various accounts. Specifically, Sokolowski used an industrial account spreadsheet that he had helped to develop while he was employed at Burbank. (Sokolowski depo at 93.) The spreadsheet contained information on every industrial account that Burbank had, including a pricing/payment formula, processing costs, and grease processing yield percentage. (Sokolowski depo at 93-94.) No competitor of Burbank would have this information, and it is not available through public sources. Sokolowski used the Burbank spreadsheet to generate quotes and calculate costs in order to bid on those same industrial accounts for United Grease. (Sokolowski depo at 130.)

In addition, Sokolowski retained driver route spreadsheets which contained information relating to the revenues per Burbank truck on a per day basis. (Sokolowski depo at 133-34.) Because these spreadsheets were specific to a single truck on a specific day, they also contained information on truck routes and the size of the various grease traps on these routes. (Sokolowski depo at 139-40.) Such information is extremely

valuable to a competitor from a logistical standpoint, and does not exist in that form, anywhere in the world.

2. Burbank Grease Took Reasonable Steps to Maintain the Secrecy of the Customer Information.

The second element of the statutory definition, the requirement of reasonable efforts to maintain secrecy, is generally consistent with the preexisting Wisconsin common law. As the statutory language indicates, what is required is security that is "reasonable under the circumstances," not perfect security. See, *B.C. Ziegler & Co. v. Ehren*, 141 Wis. 2d 19, 26 n.4, 414 N.W.2d 48, 52 n.4 (Ct. App. 1987) (fact that "better means of storage could have been devised" is not fatal to plaintiff's trade secret claim).

In another case applying Wisconsin's common law of trade secrets, the Court explained that while steps must be taken "to safeguard the secrecy of the information in question . . ., the relevant question is whether, under the circumstances, the measures adopted were reasonable." *In re Innovative Constr. Sys., Inc.*, 793 F.2d 875, 884 (7th Cir. 1986) (citing *RTE Corp. v. Coatings, Inc.*, 84 Wis. 2d 105, 115, 267 N.W.2d 226, 231(1978)). See also, *La Calhéne, Inc. v. Spolyar,* 938 F. Supp. 523, 530 (W.D. Wis. 1996) (plaintiff took reasonable measures to guard secrecy even though its employees were permitted to discuss its technical information at industry seminars and plaintiff permitted visitors in its plant) (applying Uniform Trade Secret Act as adopted in Minnesota).

Burbank Grease took reasonable measures to protect the information at issue in this case. Access to the Burbank computer system was limited through the use of passwords. (Sokolowski depo at 21.) In addition, customer lists were only supplied to

Burbank drivers as needed, and when updated lists were distributed, the previous lists were collected and destroyed. (Deposition of Nicholas Manzke at 14.) Furthermore, the Burbank Grease Services Employee Handbook contained provisions which were read and understood by Sokolowski to mean that customer lists were considered confidential business information by Burbank, and Sokolowski agreed that such information should not be disclosed to competitors of Burbank. (Sokolowski depo at 27-32.) Finally, Sokolowski sat down in a conference room with a human relations representative of the Anamax Group[1], read the Anamax Code of Conduct, which includes a provision regarding non-disclosure of confidential or privileged information, and signed a Code of Conduct Acknowledgment stating that he read, understood and agreed to adhere to the Anamax Code of Conduct. (Sokolowski depo at 32-36.) Sokolowski knew that Anamax was serious about implementing the Code of Conduct. He knew that if he did not sign the Acknowledgment form, he would be terminated. (Sokolowski depo at 33 - 36.)

The misappropriation of Burbank's secrets was a result of misplaced trust, rather than lax security. Sokolowski served in a position of authority, and, as would be expected, had access to these sources of information because he was a trusted manager. Sokolowski himself was responsible for protecting Burbank's trade secrets. As the court in *La Calhéne* noted under similar circumstances, "[i]t would be ironic, and unfair ..., if

[1] The Anamax Group of Companies consists of Anamax Corporation, a rendering company with its headquarters in Green Bay, Wisconsin; Burbank Grease Services, LLC, a grease processing facility in DeForest, Wisconsin; Maxco, a retail sales arm for the finished products of Anamax; and Anamax Transportation Corporation, the transportation arm of the Anamax Group. Anamax Corporation is a family owned business, with various family members owning various percentages of the separate entities comprising the Anamax Group. (See, deposition of Timothy Guzek, at pp. 4 - 6.)

defendant's failure to take proper measures to protect plaintiff's confidential information ... inured to his benefit." 938 F. Supp. at 530.

B. The Conduct of United Liquid Waste and United Grease Warrants a Finding of Misappropriation.

Under the UTSA, a person can misappropriate a trade secret in various ways, including: (1) acquiring the trade secret of another by means which the person knows or has reason to know constitute improper means; (2) disclosing or using without express or implied consent a trade secret of another person if the person...at the time of disclosure or use, knew or had reason to know that he or she obtained knowledge of the trade secret through...deriving it from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use. Wis. Stat. § 134.90(2). United Liquid Waste and United Grease are liable for misappropriation under either of these tests. As stated previously, Sokolowski is an owner and manager of United Grease, and therefore his actions should clearly be attributed to that entity. Furthermore, because of the lack of any distinct organizational separation between United Grease and United Liquid Waste, United Liquid Waste should also be held accountable for the misappropriations that took place.

"An improper acquisition is enough to constitute a misappropriation of a trade secret, and therefore, all remedies in Section 134.90 are available." *Minuteman Inc. v. Alexander*, 147 Wis. 2d 842, 844, 434 N.W.2d 773 (1989). It is not necessary,

therefore, to show that the defendants even utilized the information in any manner, but rather merely that they obtained the information in an improper manner.

V. Sokolowski Tortiously Interfered with the Business Relations of Burbank. By Inducing Sokolowski's Disloyalty, and by Using It to Help Capture Various Burbank Accounts for United Grease, United Liquid Waste and United Grease Also Improperly Interfered with Burbank's Business Relations.

"Wisconsin protects legitimate competition from predatory tactics by subjecting anyone who wrongfully interferes with existing or prospective contractual relations to liability." *Pure Milk Products Coop. v. National Farmers Org.*, 90 Wis. 2d 781, 796, 280 N.W.2d 691, 698 (1979). The elements of the cause of action are: (1) the existence of an existing or prospective economic relationship, (2) knowledge of the existence of the relationship, (3) intentional interference with the relationship, (4) a causal connection between the conduct complained of and the breach, and (5) a lack of justification for the interference. *Id.*; See also, *Cudd v. Crownhart*, 122 Wis. 2d 656, 659-60, 364 N.W.2d 158 (Ct.App. 1985). Sokolowski admitted that United obtained his sales leads through the use of the Burbank customer list, that the customers were solicited in the hopes of capturing their business away from Burbank, and that Sokolowski did not have a compelling reason for the interference. (See brief, at p. 6.) Therefore, the following discussion will focus on whether there was an existing or prospective economic relationship between Burbank and its clients, and whether there is a causal connection between Sokolowski's conduct and the breaches.

A. Sokolowski Tortiously Interfered with the Business Relations of Burbank Through Breach of the Duty of Loyalty Owed to Burbank, Misappropriation of Trade Secrets, and Computer Crime.

Regardless of whether Burbank's relationships with its clients is seen as contractual or simply as an ongoing business relationship, Sokolowski's interference is actionable. Rather than compete with Burbank in the normal manner of business relations, Sokolowski chose to act in a tortious and illegal manner in order to obtain an advantage and disturb the existing relationships that Burbank enjoyed with its customers.

1. Burbank Has Implied Contracts with Its Regular Customers.

In Wisconsin, tortious interference with an implied contract, terminable at will, is actionable. See, *Landess v. Borden, Inc.*, 667 F.2d 628 (7th Cir. 1981) (interpreting Wisconsin law). In *Landess*, the court found that the course of conduct between the third party dairy farmers and the plaintiff milk hauler was sufficient to establish the existence of implied contracts for purposes of surviving a motion for summary judgment. *Id,.* at 630. In that case, the defendant for three and one-half years picked up milk from the dairy farmers and delivered it to Borden. *Id.* Borden would then deduct the cost of delivery from its payments to the farmers and pay the plaintiff. *Id.* The court held that this course of dealing evidenced an implied contract - the plaintiff agreed to deliver the milk to Borden and the farmers agreed to pay him for his service. *Id.*, at 630-31.

In *Landess*, the court also held that because the plaintiff and the farmers never agreed on any length of time for the contracts, the implied contracts were for an indefinite duration and were thus terminable at will. *Id.*, at 631 (citing *Forrer v. Sears,*

Roebuck & Co., 36 Wis. 2d 388, 393, 153 N.W.2d 587, 589 (1967). Wisconsin, however, recognizes the tort of inducing termination of a contract terminable at will under the presumption that the contract "is a subsisting relation, of value to the plaintiff, and presumably to continue in effect." *Mendelson v. Blatz Brewing Co.*, 9 Wis. 2d 487, 491, 101 N.W.2d 805, 807(1960); see also, *Charolais Breeding Ranches v. FPC Sec. Corp.*, 90 Wis. 2d 97, 104, 279 N.W.2d 493, 496-97 (Ct. App. 1979); *Pure Milk Prods. Coop. v. National Farmers Org.*, 64 Wis. 2d 241, 258, 219 N.W.2d 564, 573 (1974).

Here, Burbank clearly has ongoing contractual relationships with its customers. Burbank has grease storage equipment on site at many of its customers business locations. (Sokolowski depo at 147.) When United Grease would obtain a client who had previously been a customer of Burbank, United Grease had a pre-printed form that the customer would sign and fax to Burbank indicating that they would no longer be using Burbank's services and Burbank should come out to the customer's location to pick up the on-site equipment. (Sokolowski depo at 147-49.) This conduct implies that, absent a statement by the customer to the contrary, Burbank would make regularly scheduled stops to pick up the customer's waste grease. Even if these business relationships are not seen as being born of either an express or implied contract, they are nonetheless continuously prospective business relationships and warrant protection according to the Wisconsin Supreme Court.

2. Sokolowski's Interference Was Improper.

Although Sokolowski can clearly argue that Wisconsin also recognizes a competitor's privilege for tortious interference with prospective contracts (see, e.g., *Pure Milk Prods. Coop.*, 64 Wis. 2d 241, 219 N.W.2d 564 (1974)), this privilege can easily be overcome. To overcome the competitor's privilege, the interference must be improper. See, *National Oil Co. v. Phillips Petroleum Co.*, 265 F. Supp. 320, 329 (W.D. Wis. 1966). Here, Sokolowski's and United's interference was wrongful and improper. As previously discussed, the Sokolowski obtained business from Burbank's customers through Sokolowski's breach of loyalty to Burbank and by using Burbank's trade secrets and confidential information that he wrongfully obtained. Interfering with a contract by means of breaching fiduciary duties is neither justified nor privileged. Such means of interference is unjustified because it violates the standard of business conduct deemed appropriate by society, and therefore constitutes unlawful means. See, *Select Creations, Inc., v. Paliatito Am. Inc.*, 911 F. Supp. 1130, 1159 (E.D. Wis. 1995). Likewise, the breach of a fiduciary duty "constitutes wrongful means, not subject to privilege." *Brunswick Corp. v. E.A. Doyle Mfg. Co.*, 770 F. Supp. 1351, 1366 (E.D. Wis. 1991).

B. By Inducing Sokolowski's Disloyalty, and by Using It to Help Capture Various Burbank Accounts for United Grease, United Liquid Waste and United Grease Also Improperly Interfered with Burbank's Business Relations.

United Liquid Waste's and United Grease's tortious interference liability to Burbank is two-fold. First, they are liable for tortious interference because they assisted

Sokolowski in violating his agency duties to Burbank. Second, they are liable for tortious interference because they used improper means – namely Sokolowski's unlawful and improper acts – to interfere with Burbank's contractual relationships with its customers.

As to the first level of interference, the decision in *St. Francis Savings and Loan Association v. Hearthside Homes, Inc.*, 65 Wis. 2d 74, 221 N.W.2d 840 (1974), is controlling. In *St. Francis*, the Court adopted § 312 of the *Restatement (Second) of Agency* as the law of our state. That section provides that "a person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal." *Id.*, at 81, 221 N.W.2d at 844. The court emphasized that under this provision, proof that the third party actually caused the disloyalty is not required; "intentional assistance is enough." *Id.*, at 81, 221 N.W.2d at 845. Moreover, under this provision, there is no "competitor's privilege" to interfere with the agent-principal relationship. See, *Restatement (Second) of Agency* § 312, cmt. a (1958). As indicated earlier, as manager and owner of United Grease, Sokolowski's acts should be attributed to United Grease. Given the symbiotic relationship between United Grease and United Liquid Waste, Sokolowski's acts should also be attributable to United Liquid Waste.

On a second level, United Liquid Waste and United Grease interfered with Burbank's contracts with its customers by using Sokolowski's disloyalty to their advantage. While the contracts between Burbank and its clients were admittedly terminable at will, this fact does not preclude liability for tortious interference. See, *MacKenzie v. Miller Brewing Co.*, 2001 WI 23, 241 Wis. 2d 700, 623 N.W.2d 739 (2001) ("There can be tort liability

for interference with a contract terminable at will"). While competitors are free to interfere with such contracts so long as they do not employ improper means, United Liquid Waste and United Grease are in no position to invoke this privilege. United Liquid Waste and United Grease's means included improperly obtaining confidential information from Sokolowski and improperly enlisting Sokolowski in the effort to solicit Burbank's business for United Grease.

VI. By Actively Participating in a Scheme to Divert Burbank's Business to United Liquid Waste and United Grease by Unlawful Means, Sokolowski, United Liquid Waste and United Grease Engaged in a Conspiracy.

Under Wisconsin law, liability for civil conspiracy arises when "[a]ny 2 or more persons . . . combine, associate, agree, mutually undertake or concert together for the purpose of willfully or maliciously injuring another in his or her reputation, trade, business or profession by any means whatever." §134.01, Wis. Stats. A violation of §134.01 may be "based upon concerted action to accomplish some unlawful purpose or upon concerted action to accomplish some lawful purpose by unlawful means." *Onderdonk v. Lamb,* 79 Wis. 2d 241, 247, 255 N.W.2d 507, 510 (1977). In addition to establishing the requisite unlawful conduct, a claimant must show that the alleged conspirators were motivated, at least in part, by "malice" towards the claimant. *Maleki v. Fine-Lando Clinic Chartered,* 162 Wis. 2d 73, 88, 469 N.W.2d 629, 635 (1991). "[T]he act of a person . . . is malicious if the actor acts intentionally and knowingly for 'unworthy or selfish purposes.'" *Mendelson v. Blatz Brewing Co.,* 9 Wis. 2d 487, 493, 101 N.W.2d 805, 808

(1960) (quoting *E.L. Husting Co. v. Coca Cola Co.*, 205 Wis. 356, 366, 237 N.W. 85, 89 (1931)).

Sokolowsi, as manager and part owner of United Grease, has solicited Burbank's large chain restaurant accounts by conveying to those customers that Burbank was illegally draining grease traps back down the sewer system. (Sokolowski depo at 56-61.) He has made these accusations despite the fact that he has not actually witnessed any Burbank trucks engaging in such activities. (Sokolowski depo at 59.) Sokolowski's only motivation for making such statements is to obtain these accounts for United Grease Such conduct exhibits the requisite malice required by the Court in *Maleki*.

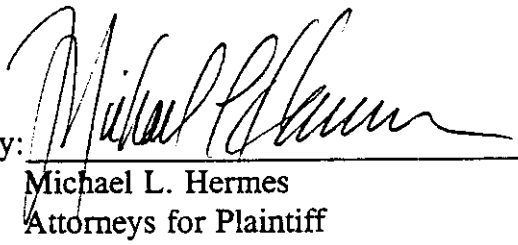
CONCLUSION

Sokolowski, by his own admission, has wrongfully taken confidential and legally protected information from his former employer, Burbank, and has used that information to target customers for United Grease, a direct competitor of Burbank. Sokolowski has used customer lists to generate leads and has used Burbank's pricing information to solicit industrial accounts. We smply ask the court to grant the plaintiff,

Burbank, summary judgment as to those causes of action for which there no longer exists any question of fact.

Respectfully submitted this 15th day of August, 2003.

METZLER AND HAGER, S.C.

By: 

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STATE OF WISCONSIN CIRCUIT COURT
BRANCH 5

BURBANK GREASE SERVICES, LLC,
a Wisconsin limited liability company,

Plaintiff,

v.

LARRY SOKOLOWSKI;
UNITED GREASE, L.L.C.,
a Wisconsin limited liability company; and
UNITED LIQUID WASTE RECYCLING, INC.,
a Wisconsin corporation,

Defendants.

Case No. 02-CV-2397

Case Code No. 30303
Other Contracts

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTIONS FOR SUMMARY JUDGMENT BY SOKOLOWSKI, UNITED GREASE AND UNITED LIQUID WASTE[1]

I. INTRODUCTION

If one were only to read the briefs of the defendants in this case, one would be left with the mistaken impression that virtually the only argument being made by Burbank against the defendants is that Sokolowski obtained a general customer list, and that Burbank considers that customer list a trade secret.[2] Not only is this limited focus entirely misplaced, but the defendants rely on an improper reading of the law to make their arguments. The plaintiff has never maintained that the names and addresses of its

[1] Because the bulk of the arguments made by Sokolowski and the United entities are essentially the same, Burbank is putting its opposition into one brief. If one of the defendants makes a unique argument, it will be addressed accordingly.

[2] Out of 22 pages of the Argument section of Sokolowski's brief, 14 are devoted to the issue of trade secrets. United Grease and United Liquid Waste devote almost 9 out of 13 pages of their Argument section to trade secrets. Neither brief addresses any issue beyond a customer list, however.

customers alone are what make the information improperly taken and used by Sokolowski and United Grease to constitute a trade secret. The defendants' argument blatantly ignores the fact that in addition to names and addresses of customers, Sokolowski took an industrial account spreadsheet that contained information on every industrial account, including pricing/payment formula, plaintiff's internal processing costs, and the grease processing yield percentage. No competitor of plaintiff would have this information and it is not available through public sources. In addition, Sokolowski pilfered driver route spreadsheets which contained information relating to the revenues generated per Burbank truck on a daily basis. Such information would be extremely valuable to a competitor and does not exist in that form anywhere else in the world.[3]

Regardless of the misplaced focus of the defendants, and in spite of the claims of the defendants that the information taken by Sokolowski was "easily available"[4] and such information "has little if any independent economic value to anyone other than Burbank"[5], it is undisputed that Sokolowski took Burbank's customer information and used it in his competing business. If it had no value or was so easily obtainable as Sokolowski and the United entities maintain, then Sokolowski should not have taken it, nor should he have used it in his new business. Sokolowski's own actions belie the defendants' arguments.

[3] See plaintiff's brief in support of summary judgment, pp. 11-12.
[4] See Sokolowski's brief in support of summary judgment, p. 22.
[5] See United Liquid Waste and United Grease's brief in support of summary judgment, p. 22.

II. ARGUMENT

A. DEFENDANTS HAVE NOT MET THE REQUIREMENTS TO OBTAIN A SUMMARY JUDGMENT.

The party making the motion for summary judgment is required to establish that there is no factual dispute and that the moving party is entitled to summary judgment as a matter of law. *Grosskopf Oil, Inc. v. Winter*, 156 Wis. 2d 575, 581, 457 N.W.2d 514, 517 (1990). Upon a reasonable and liberal review of the pleadings, a motion for summary judgment must fail if there exist genuine issues of material fact. *Wisconsin Telephone Co. v. Central Contracting Co.*, 254 Wis. 480, 483-84, 37 N.W.2d 24 (1949). Furthermore, "if competing inferences arise from the evidence, summary judgment is inappropriate." *Schlumpf v. Yellick*, 94 Wis. 2d 504, 512, 288 N.W.2d 834 (1980). On summary judgment, the court does not decide the issue of fact; it decides whether there is a genuine issue of fact. *Grams v. Boss*, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

B. SOKOLOWSKI CANNOT DENY THAT HE ACCESSED, REMOVED AND DISCLOSED COMPUTER DATA WITHOUT BURBANK'S AUTHORIZATION; HIS MOTION FOR SUMMARY JUDGMENT MUST FAIL.

Sokolowski's defense to the claim of violation of §943.70, Stats., is that because he accessed the computer information during his employment when he had permission to do so, the fact that he took it to his home, entered it into the computer system of United Liquid Waste for use in his new company, United Grease, and used it while at United Grease to compete with Burbank is acceptable. Under this misplaced logic, no departing employee could ever be guilty of a computer crime, provided he or she accessed the data

during his or her employment. Sokolowski argues that if the access is okay, the use must also be okay. This logical fallacy cannot be used to sustain summary judgment in favor of Sokolowski.

While it is undisputed that during his employment, Sokolowski, as a trusted manager, did have the authority to access Burbank's internal customer information, implicit within that authority is the reasonable inference that the access of that information would be to use it to further the purpose of Burbank, not to further the purpose of a competing enterprise. It is equally undisputed that Sokolowski, after his termination from Burbank, disclosed this information to both United Liquid Waste and United Grease, and used the information in the business of United Grease. Such conduct is a clear violation of §943.70(2)(a)3, 4, 5 and 6. As such, Sokolowski's motion must be denied.

C. GIVEN SOKOLOWSKI'S ADMISSION THAT HE DISCLOSED BURBANK'S CONFIDENTIAL INFORMATION TO UNITED GREASE AND THAT HE USED THE INFORMATION FOR THE BENEFIT OF UNITED GREASE, SOKOLOWSKI'S MOTION FOR SUMMARY JUDGMENT ON THE BREACH OF AGENCY CLAIM MUST BE DENIED.

On page 8 of Sokolowski's brief in support of summary judgment, he makes the statement that "neither the language of the jury instruction nor any Wisconsin case law supports Burbank's claim that Sokolowski had a duty not to use or disclose to third parties written lists of names or other alleged confidential information after termination of the agency relationship." Apparently, Sokolowski has not read one of the comments to Jury Instruction 4020 that Sokolowski cites in his brief. The comment to Jury Instruction 4020 reads:

> This is intended as a general instruction on the duties of an agent. For details as to the respects in which this instruction can be amended to fit particular factual situations, see *Restatement (Second) of Agency*, §§377-398 (1958); Callighan's Wis. Digest, Principal and Agent, §§50-52 (1950).

As recommended in the Jury Instruction, the Wisconsin Supreme Court has cited sections 387-98 of the *Restatement (Second) of Agency* as to set forth agents' fundamental duties with respect to their principals. *Hartford Elevator, Inc., v. Lauer*, 94 Wis. 2d 571, 580, 289 N.W.2d 280, 284 (1980). Among these sections is §396, which supports the specific factual situation of the case at bar.

> §396 provides in pertinent part:
>
> Unless otherwise agreed, after the termination of the agency, the agent . . .;
>
> (b) has a duty to the principal not to use or disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business or the principal and the names of customers retained in his memory, if not acquired in violation of his duty as agent.

The admitted violations by Sokolowski to this duty, imposed on him by Wisconsin law, are numerous. The duty clearly applies, "after the termination of the agency." During that time, Sokolowski has a legal duty "not to use or disclose to third persons, on his own account or on account of others." Sokolowski has done both. He has done so "in competition with the principal or to his injury." Moreover, the duty applies to both trade secrets, and to "written lists of names, or other similar confidential matters." Note that the *Restatement* separates trade secrets with written lists of names and other matters that may not always be considered trade secrets. Consequently, not all of the information taken by Sokolowski has to qualify as a trade secret for him to have breached his duty of agency.

Finally, Sokolowski may not use the information, even if it was "given to him only for the principal's use." Again, Sokolowski's argument in response to the computer crime allegation was that he had the right to access this information. Because it was given to him only for the principal's use, however, his subsequent disclosure and use of this information clearly violates a duty he owed to Burbank. For this reason, not only must his summary judgment argument fail on the duty of Agency, but it appears that all of the facts are in place that would necessarily require this court to grant Burbank's motion on this cause of action.

Two cases cited by Sokolowski may be distinguished from §396 of the *Restatement*, and are inapplicable to the breach of Agency duty. Sokolowski cites *Corroon & Black*[6], and *Van Zeeland*[7] in support of his claim that no duty exists. Initially, both *Corroon & Black* and *Van Zeeland* are pre-Uniform Trade Secrets Act trade secret cases, and neither one expressly deals with the duty of Agency created by the *Restatement*. The specific citation to *Corroon & Black* at p. 297 by Sokolowski relates to the declination by the Wisconsin Supreme Court to afford trade secret protection to customer lists pre-UTSA, and has nothing to do with the duty of Agency.

The citation to *Van Zeeland* is equally inapplicable in that Sokolowski has admitted to taking more than "his experience and intellectual development." He took documents that contain not only customer names and addresses, but also pricing, internal cost numbers, profitability, and grease yield.[8] These items can and should qualify as trade secrets.

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[6] Corroon & Black Rutters & Roberts, inc. v. Hosch, 109 Wis. 2d 290, 325 N.W.2d 883 (1982).
[7] Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis. 2d 202, 267 N.W.2d 242 (1978).
[8] *See*, Plaintiff's Brief in Support of Summary Judgment, citing Larry Sokolowski's deposition, pp. 93-94.

With respect to the duty of loyalty claim, however, whether the information wrongfully taken and used by Sokolowski is found to be a trade secret or not is irrelevant. The *Restatement* duty applies equally to "trade secrets, **written lists of names, or other similar confidential matters**." *Restatement (Second) Agency*, §396, (emphasis added). Consequently, Sokolowski's claim for summary judgment on the breach of Agency claim, which fails to take into account all facts and relies on inapplicable case law, must fail.

D. UNITED GREASE AND UNITED LIQUID WASTE AIDED AND ABETTED SOKOLOWSKI'S BREACH OF AGENCY DUTY AS A MATTER OF LAW.

At page 25 of their brief, the United entities claim that the "customer information was not a trade secret and it was not protected by a valid post-employment noncompete or nondisclosure agreement. With these absent there is no duty." Conspicuously absent from the United entities' brief is a citation to any law or reported case to support this allegation. Burbank surmises that none exists.

This court should easily conclude that the opposite is in fact true. The decision in *St. Francis Savings & Loan Assn. v. Hearthside Homes, Inc.*, 65 Wis. 2d 74, 221 N.W.2d 840 (1974) is directly applicable in establishing not only the duty of Sokolowski, but also the liability of the United entities. In that case, the court referenced §312 of the *Restatement (Second) of Agency*. That section provides:

> A person who, without being privileged to do so, intentionally causes or assists an agent to violate a duty to his principal is subject to liability to the principal.

Id., at 81, 221 N.W.2d at 844. The court emphasized that under this provision proof that the third party actually caused the disloyalty is not required, holding that "intentional

assistance is enough." *Id.*, at 81, 221 N.W.2d at 845. Moreover, under this *Restatement* provision, there is no "competitors privilege" to interfere with the agent-principal relationship. See, *Restatement (Second) of Agency*, §312 cmt. a (1958). Consequently, United Grease and United Liquid Waste had no privilege to interfere.

The record here amply demonstrates that the United entities intentionally assisted Sokolowski's disloyal acts. United Liquid Waste provided the computer system and the personnel on which Sokolowski directed United Liquid Waste employees to enter Burbank's customer information. Moreover, United Liquid Waste provided Dave Reinbold, a salesman, to assist Sokolowski in utilizing the confidential information to solicit Burbank's customers. Because of the absolute duty Sokolowski owed Burbank, the United entities had no privilege to engage in this activity and, therefore, they are subject to liability. For these reasons, summary judgment in favor of the United entities must be denied.

E. THE DEFENDANTS HAVE BEEN UNSUCCESSFUL IN ESTABLISHING A CLAIM FOR SUMMARY JUDGMENT ON THE ISSUE OF TRADE SECRETS.

As noted above, the defendants all myopically focus on the issue of customer lists, while ignoring the other information inappropriately obtained and used by Sokolowski. Compounding the defendants' myopia problem is their misplaced heavy reliance on pre-Uniform Trade Secrets Act cases which are no longer the law of this state. This court's reliance on only a small set of fact and only those pre-UTSA cases would be equally misplaced, and summary judgment therefore, is not appropriate.

1. Defendants Mischaracterize Both the Law and the Facts.

In seeking to establish summary judgment on the issue of trade secrets, the defendants point solely to general customer information as the information which Burbank seeks to be afforded trade secret protection. Defendants' misstatement, however, ignores the pricing, frequency, pricing/payment formula, internal processing costs, grease yield percentage, and internal revenue per truck numbers contained on the information Sokolowski possessed.[9] It is this information, coupled with the specific customer, address, contact, phone number, etc., that could take competition from the kind that a stranger could give to that which is unfair and subject to protection under the law.

The main case cited by defendants, particularly Sokolowski, is *Corroon & Black*, a pre-Uniform Trade Secrets Act case. In its first opinion applying the UTSA in Wisconsin, the Wisconsin Supreme Court has recognized that the common law trade secret definition it had adopted in a prior opinion is "no longer the legal standard." *Minuteman Inc. v. Alexander,* 147 Wis. 2d 842, 852, 434 N.W.2d 773, 777 (1989) (discussing *Corroon & Black-Rutters & Roberts, Inc. v. Hosch,* 109 Wis. 2d 290, *325* N.W.2d 883 (1982)). The court noted that while the old test drawn from the First Restatement of Torts may be helpful, proof of those elements is "no longer required." *Id.*, at 853, 434 N.W.2d at 777. And on the specific issue of trade secret protection for customer lists, the court held that its prior decision in *Corroon & Black* "no longer embodies the definition of trade secret." *Id.* at 857, 434 N.W.2d at 779. The court instead directed lower courts to give "careful

[9] *See,* footnote 8, *supra.*

consideration" to decisions from other states upholding trade secret protection for customer lists. *Id.*

2. The Identity of Burbank's Customers, and the Pricing/Payment Formula, Internal Costs, Grease Yield, and Account Profitability Are Protectable Trade Secrets.

Heeding the supreme court's advice in *Minuteman,* this Court should look to the developing law under the Uniform Trade Secrets Act with respect to protection of customer lists and other information. Under that law, while customer identities are not automatically protected as trade secrets, such protection is available. *See, Morlife, Inc. v. Perry,* 56 Cal. App. 4th 1514, 66 Cal. Rptr. 2d 731, 735-37 (1997) (applying Uniform Trade Secret Act as adopted in California). Other courts applying the Uniform Trade Secret Act have come to the same conclusion. *See, e.g., Allen v. Johar, Inc.,* 823 S.W.2d 824, 826-27 (Ark. 1992) ("customer lists obtained through use of a business effort, and the expenditure of time and money that are not readily ascertainable and are kept confidential are given protection as a trade secret."); *Fred's Stores of Mississippi, Inc. v. M&H Drugs, Inc.,* 725 So. 2d 902, 908-11 (Miss. 1998) (upholding trade secret protection for a pharmacy's customer list under Mississippi's enactment of the Uniform Trade Secrets Act); *Ed Nowogroski Ins., Inc. v. Rucker,* 971 P.2d 936, 943-44 (Wash. 1999) ("a customer list is one of the types of information which can be a protected trade secret if it meets the criteria" of the Uniform Trade Secrets Act as adopted in Washington). Each of these cases was cited by Burbank in its Brief in Support of Motion for Summary Judgment (at p. 10). Defendants, however, only cite outdated Wisconsin law.

The customer information obtained and used by the defendants is not simply a result of identifying businesses that could need a particular type of service. Instead, the customer information comprises those businesses who do receive the particular service that Burbank offers. Like the customer list at issue in *Morlife,* a competitor could use a list such as this to target its sales efforts to accounts with an already-demonstrated interest in the particular service at issue. As in *Morlife*, Burbank's customer list is a protectable trade secret.

As noted in Plaintiff's Brief in Support of Summary Judgment (at p. 10 – 11), protection under the Uniform Trade Secret Act has also been extended to information about the profitability of all or part of an employer's business. *See, Roton Barrier, Inc. v. Stanley Works,* 79 F.3d 1112, 1117-18 (Fed. Cir. 1996) (applying Uniform Trade Secrets Act as adopted in Illinois to information about gross margins and sales data); *La Calhene, Inc. v. Spolyar,* 938 F. Supp. 523, 527, 529 (W.D. Wis. 1996) (information concerning gross margin percentages and proforma income statements held protected under Uniform Trade Secrets Act as adopted in Minnesota); *Hydraulic Exchange and Repair, Inc. v. KM Specialty Pumps, Inc.,* 690 N.E.2d 782 (Ind. Ct. App. 1998) (plaintiff's daily compilations of profits and sales held protectable as trade secret under Indiana's Uniform Trade Secrets Act). The general customer information, coupled with the profitability, frequency, cost and other sensitive internal Burbank information, could allow United Grease to target its efforts only on the most profitable accounts, which no other competitor would know. As such, Burbank's information should be protected; the defendants' motion should be denied.

Whether any particular customer list or financial information qualifies as a trade secret is a fact-intensive determination. As one court explained:

> Briefly expressed, whether a customer list is protected as a trade secret depends on three factual inquiries: (1) whether the list is a compilation of information; (2) whether it is valuable because unknown to others; and (3) whether the owner has made reasonable attempts to keep the information secret.

Nowogroski Ins., 971 P.2d at 944. As with similar fact-intensive determinations, the Wisconsin Supreme Court has cautioned that, determinations like this are not well-suited for resolution on summary judgment. *See, Rollins-Burdick-Hunter of Wisconsin, Inc. v. Hamilton,* 101 Wis. 2d 460, 470-71, 304 N.W.2d 752, 757 (1981). In that case, the issue was whether employees had received sufficient exposure to the employer's customer list so as to justify a noncompete restriction barring the employees from doing competitive business with any customer on the list. *Id.* at 462-63, 304 N.W.2d at 753.

Resolving this issue would require:

> consideration of the nature and character of such information, including the extent to which it is vital to the employer's ability to conduct its business, the extent to which the employee actually had access to such information, and the extent to which such information could be obtained through other sources.

Id. at 470, 304 N.W.2d at 757. The court held that where "the ultimate issue - the reasonableness of the agreement - turns upon the totality of the facts and circumstances surrounding them, the parties must be given a full opportunity to develop the necessary evidentiary record," and summary judgment is inappropriate. *Id.*, at 471, 304 N.W.2d at 757.

While defendants predictably dispute the protectability of Burbank's asserted trade secrets, they present only "one side of the story." Burbank, on the other hand, has presented a *prima facie* case for trade secret protection. On this record, therefore, Burbank is entitled to a trial on its trade secret claims. Defendants' motion should be denied.

3. Burbank Took Reasonable Measures to Protect Its Trade Secrets.

While defendants again disagree that Burbank undertook reasonable efforts to maintain the secrecy of Burbank's customer information, the fact remains that the statutory language indicates, what is required is security that is "reasonable under the circumstances," not perfect security. *See, B. C. Ziegler & Co. v. Ehren,* 141 Wis. 2d 19, 26 n.4, 414 N.W.2d 48, 52 n.4 (Ct. App. 1987) (fact that "better means of storage could have been devised" is not fatal to plaintiff's trade secret claim). As with the above analysis, the question of reasonableness is best left up to the jury to decide after considering all of the circumstances. Burbank's Brief in Support of Summary Judgment (at p. 12 – 13) outlines what Burbank believes to be reasonable measures. Sokolowski knew the importance of protecting confidential information, knew that customer lists were considered confidential, and knew that they should not be disclosed to competitors of Burbank.[10] At worst, defendants' motion should be denied. At best, summary judgment should be granted in favor of Burbank.

F. THE DEFENDANTS' CLAIM OF COMPETITORS PRIVILEGE IS IMPROPER AND NOT SUFFICIENT TO WARRANT SUMMARY JUDGMENT ON PLAINTIFF'S CAUSE OF ACTION FOR TORTIOUS INTERFERENCE.

Defendants' briefs properly outline the law regarding tortious interference and the competitors privilege. Defendants' briefs, however, stop short of explaining how the defendants' conduct falls within the competitors privilege. The standard cited by Sokolowski in his brief recognizes that the competitor's privilege is inapplicable if the

competitor uses "improper means." (*See*, Sokolowski's brief in support of summary judgment, p. 25.) Plaintiff's Brief in Support of its Motion for Summary Judgment, however, outlines the breach of a fiduciary duty as "wrongful means, not subject to privilege." (*See*, Burbank's Brief in Support of Summary Judgment, p. 18.) The defendants' lack of analysis, along with the case law favoring Burbank, should lead this court to deny summary judgment on this issue.

Defendants' motion for summary judgment must fail because the defendants did not avail themselves of the competitors privilege. The problem is that Sokolowski and United Grease did use improper, wrongful means to solicit Burbank's accounts. First, Sokolowski's breach of his duty of loyalty to Burbank in using confidential information to solicit these accounts is improper. Because United Grease and United Liquid Waste aided and abetted Sokolowski in this pursuit, they are liable as well. Second, Sokolowski has admitted to using misrepresentation to Burbank's customers to solicit their business. In his deposition, Sokolowski stated that he told accounts that Burbank was violating the law by dumping wastewater back down the sewage system. This statement caused accounts to switch their business to United Grease. Sokolowski, however, had no foundation for making this malicious claim.[11] Of course, Burbank denies that this conduct violates any Wisconsin law. By Sokolowski's own admission, this meritless and unscrupulous attack against his former employer has resulted in causing Burbank's customers to switch to United Grease. (*See*, Sokolowski deposition, p. 58.) Sokolowski's scurrility should not be

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[10] *See*, Burbank's Brief in Support of Summary Judgment, p. 13, citing Sokolowski's deposition, pp. 27 - 32.
[11] *See*, Burbank's Brief in Support of Summary Judgment, p. 21, citing Sokolowski's deposition, pp. 56 - 61.

rewarded with summary judgment. The motion made by all defendants should be denied because their actions do not fall within the accepted standards for a competitors privilege.

G. FOR THE SAME REASON DEFENDANTS' CLAIM FOR SUMMARY JUDGMENT ON THE ISSUE OF TORTIOUS INTERFERENCE MUST BE DENIED, SO TO MUST DEFENDANTS' CLAIM FOR SUMMARY JUDGMENT ON THE ISSUE OF CONSPIRACY.

The conduct by Sokolowski (as outlined above) in soliciting Burbank's accounts by conveying untruthful, slanderous statements to Burbank's accounts was malicious. The fact that these statements were conveyed for the purpose of obtaining the business does not bring them within a competitors privilege or show that malice was not present. In fact, the evidence supports a *prima facie* case that the defendants acted in concert to accomplish some lawful purpose by unlawful means. More importantly, if the evidence supports a "reasonable inference" that alleged conspirators acted with malice in pursuit of some unlawful objective, then the ultimate issue of liability is for a jury to decide. Thus, summary judgment should be denied.

III. CONCLUSION

The defendants motions lack the requisite legal and factual support to warrant the extreme remedy of summary judgment. Burbank, therefore, respectfully requests that the court deny defendants' motions, in their entirety.

Respectfully submitted this 15th day of September, 2003.

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STATE OF WISCONSIN | CIRCUIT COURT BRANCH 5 | DANE COUNTY

BURBANK GREASE SERVICES, LLC,
a Wisconsin limited liability company,

Plaintiff,

v.

LARRY SOKOLOWSKI;
UNITED GREASE, L.L.C.,
a Wisconsin limited liability company; and
UNITED LIQUID WASTE RECYCLING, INC.,
a Wisconsin corporation,

Defendants.

Case No. 02-CV-2397

Case Code No. 30303
Other Contracts

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Although Sokolowski prepared a separate brief from the United entities in opposition to Burbank's motion for summary judgment, Burbank will submit one reply brief in an effort to refocus the issues and to provide this court with an adequate framework within which to make its decision. Because all of the defendants have raised the issue of whether the adoption by Wisconsin of the Uniform Trade Secrets Act preempts Burbank's other common law claims, it is logical to address that issue first. Each of Burbank's other causes of action will then be addressed in turn as each applies to the particular defendants involved.

II. ARGUMENT

A. WISCONSIN'S ADOPTION OF THE UNIFORM TRADE SECRETS ACT SHOULD NOT PREEMPT BURBANK'S NON-TRADE SECRET COMMON LAW CLAIMS.

Burbank concedes that if it does have protectable trade secrets that were improperly obtained by Sokolowski, the only way to redress that harm is through a claim based on the Uniform Trade Secrets Act, which Burbank has maintained. Burbank concedes that it cannot obtain the same remedy against Sokolowski for its loss of trade secret information through its breach of duty of agency claim. However, Burbank's common law claims that are not based solely on trade secrets must stand.

In the opposition briefs, defendants all cite primarily to the body of law created by the Federal Court in the Northern District of Illinois, and primarily, Thomas & Betts Corp. v. Panduit Corp., 108 F. Supp.2d 968 (N.D. Ill. 2000). Unfortunately, no Wisconsin courts have interpreted the preemption provision of the Wisconsin Uniform Trade Secrets Act.

The law created by the Federal Court in the Northern District of Illinois is not controlling here. While the cases may be read to see how other jurisdictions have interpreted a similar provision in the statutes, Wisconsin courts would likely look upon the Uniform Trade Secrets Act's preemption clause differently, as have other courts throughout the country.

The Northern District of Illinois has ignored the plain language of the Uniform Trade Secrets Act. §134.90(6) provides:

> (a) Except as provided in par. (b), this section displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy *for misappropriation of a trade secret*.

(b) This section does not affect any of the following:

(i) Any contractual remedy, whether or not based upon misappropriation of a trade secret.

(ii) Any civil remedy *not based upon misappropriation of a trade secret*.

(iii) Any criminal remedy, whether or not based upon misappropriation of a trade secret.

(Emphasis added.) The plain language of this statute dictates that if one party is suing another for misappropriation of a trade secret, it may only do so under a contractual remedy or the Uniform Trade Secrets Act. However, the preemption clearly does not apply to civil remedies "not based upon misappropriation of a trade secret." In other words, parties may sue in tort seeking remedies that are not based upon misappropriation of a trade secret, like claims for breach of agency duty.

The plain language reading of this statute makes perfect sense. Many, many things exist that parties would deem to be confidential information. Out of this large body of confidential information, a small subset would also qualify as a trade secret. Following the logic proposed by defendants would allow for one to sue another only if the confidential information that was misappropriated constituted a trade secret, and would bar any other claim for misappropriation of confidential information. (United's response brief, p. 3.) Such an interpretation would invalidate thousands of Confidentiality Agreements in place in this state, and would be contrary to public policy.

Wisconsin case law recognizes a distinction between trade secrets and other confidential information which may be protected. In Hunter of Wisconsin, Inc. v. Hamilton, 101 Wis. 2d 460, 469, 304 N.W.2d 752, 756-57 (1981), the Wisconsin

Supreme Court analyzed whether key customer information was properly the subject of a restrictive covenant. In so doing, the court recognized the distinction between trade secrets or other protectable confidential information. The court noted:

> This case involves allegations that Hamilton and Hays had access to vital information about customer names, policy data, and expiration dates which was not limited to those clients whom they serviced personally. Whether this sort of information may be considered "trade secrets" is uncertain. [citations omitted.] But that it may be a proper subject of protection by restrictive covenant is beyond dispute. [citations omitted.]

Id., 101 Wis. 2d at 468-69. Wisconsin has clearly recognized the difference between protectable trade secrets and other protectable confidential information. Thus, a claim under the Uniform Trade Secrets Act does not preempt common law tort actions for protection of confidential information that may not rise to the level of a trade secret.

This view is also consistent with Wisconsin's recognition of the *Restatement* (Second) *of Agency*, §396. That section provides in pertinent part:

> Unless otherwise agreed, after the termination of the agency, the agent:
>
> . . .
>
> (b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, *trade secrets, written lists of names, or other similar confidential matters* given to him only for the principal's use or acquired by the agent in violation of duty. . . .

(Emphasis added.) By listing trade secrets as well as other confidential matters, the Restatement makes this distinction between those items that are confidential and also qualify as a trade secret, and those items which may not qualify as a trade secret, but an agent is still duty-bound not to disclose. Consequently, Burbank may maintain a common

law cause of action for breach of agency duty of confidential information that does not rise to the level of a trade secret.

Courts from other jurisdictions have allowed claims similar to those asserted by Burbank to go forward. Burbank's computer crimes allegation, breach of duty of loyalty, aiding and abetting, tortious interference and conspiracy claims are not premised *solely* on allegations that one or more of the defendants misappropriated trade secret information, nor do these claims necessarily depend upon proof that the defendants actually misappropriated trade secret information. Although intended to be uniform, case law from across the nation makes it clear that the Northern District of Illinois is not the standard, and that other tort causes of action are routinely not barred unless there is complete factual overlap between them and the trade secret claims. *See, e.g.*, Micro Display Sys., Inc. v. Axtel, Inc., 699 F. Supp. 202, 205 (D. Minn. 1988) ("[T]he court will allow plaintiff to go forward and maintain its separate causes of action [which include tortious interference and conspiracy] to the extent that the causes of action have 'more' to their factual allegations than the mere misuse or misappropriation of trade secrets."); Powell Products, Inc. v. Marks, 948 F. Supp. 1469, 1474 (D. Colo. 1996) ("Preemption is only appropriate where 'other claims are no more than a restatement of the same operative facts which would plainly and exclusively spell out only trade secret misappropriation.'") (quoting Roger R. Milgrim, *Milgrim on Trade Secrets*, §1.01[4], at 1-68.14 (1996)); Stone Castle Financial, Inc. v. Friedman, Billings, Ramsay & Co., Inc., 191 F. Supp.2nd 652, 659 (E.D. Va. 2002) ("[U]nless it can be clearly discerned that the information in question constitutes a trade secret, the Court cannot dismiss alternative theories of relief as preempted by the VUTSA."); Smithfield Ham Prods. Co. v. Portion Pac, Inc., 905 F. Supp. 346, 348-49

(E.D. Va. 1995) (indicating that claims for tortious interference would survive summary judgment if it was demonstrated that they were "supported by facts unrelated to the [alleged] misappropriation of [a] trade secret."); Coulter Corp. v. Leinert, 869 F. Supp. 732, 734-35 (E.D. Mo. 1994) (indicating that dismissal is proper only if a cause of action is based on "allegations of trade secret misappropriation alone," and holding that the Florida version of the UTSA "does not apply to duties imposed by law that are not dependent upon the existence of competitively significant secret information, like an agent's duty of loyalty to his or her principal.")

With respect to the allegations against the United entities as pled, the tort-based claims make clear that they involve more than just the alleged misappropriation of trade secrets. For instance, the aiding and abetting the breach of agency duty claim alleges that the United entities lent assistance to Sokolowski to breach his agency duty that he owed to Burbank. (Complaint at ¶26.) How else could Burbank attempt to seek redress from the United entities except through this type of cause of action? It is not alleged that the United entities were the parties responsible for misappropriating any confidential information or trade secrets. It is alleged, however, that United Grease benefited from receipt of confidential information and trade secrets.

In addition, the claims for interference with business relations and conspiracy also similarly do not rely solely on an allegation of misappropriation of trade secrets. The allegation regarding interference with business relations alleges that Sokolowski and United Grease used wrongful means to cause customers to discontinue their relationships with Burbank. As the evidence has established in this case, the wrongful means could be the misuse of confidential information or trade secrets, but it could also be the statements made

to customers that Burbank was illegally dumping waste material back down the sewer system. (Hermes affidavit, ¶6.[1]) Likewise, the conspiracy claim focuses not solely on trade secrets, but also the use of other confidential information to cause damages to Burbank. (Complaint, ¶46.) As other courts have done, this court should also allow these alternative theories of recovery to stand. *See*, Stone Castle, *supra*; Smithfield Ham, *supra*; and Micro Display, *supra*.

For the foregoing reasons, it should be clear that Burbank should be allowed to maintain its common law causes of action against Sokolowski and the United entities for claims regarding improper use of confidential information that does not rise to the level of a trade secret. This court (or a jury) must make the appropriate determination as to whether the information alleged in the complaint that Sokolowski has taken constitutes a trade secret. As to that information, Burbank admits that common law tort claims against Sokolowski are pre-empted. Otherwise, Burbank should be allowed to proceed on its other claims, consistent with the laws of this state.

B. THE MATERIALS TAKEN BY SOKOLOWSKI AND DISCLOSED TO UNITED GREASE CONSTITUTE A PROTECTABLE TRADE SECRET UNDER WISCONSIN STATUTES §134.90.

Sokolowski makes various arguments to support his contention that the information he possessed that belonged to Burbank does not constitute a trade secret. He states that the information that he used was just a format followed by all competitors, and not anything specific to Burbank (Sokolowski opposition brief, p. 6), that he had the spreadsheet at his

[1] All references to "Hermes affidavit" are to the affidavit of Michael L. Hermes filed in Support of Plaintiff's Motion for Summary Judgment.

house, and forgot that he had it there after his termination (Sokolowski opposition brief, p. 6), that the information did not help him compete with Burbank because he was only successful in soliciting one complete account and one partial account (Sokolowski opposition brief, pp. 6-7), and that the information regarding driver route spreadsheets was not used and could have changed (Sokolowski opposition brief, p. 8). None of these excuses defeat the undisputed fact that Sokolowski had possession of this information (Sokolowski opposition brief, p. 6; Hermes affidavit, ¶6), Sokolowski disclosed this information to United Grease (Hermes affidavit, ¶6; Affidavit of Debora Bohlman filed in support of Temporary Restraining Order, ¶3), and that on some level, Sokolowski and United Grease used this information to solicit business (Hermes affidavit, ¶¶6 and 10.). Even if Sokolowski or United Grease did not use this information, "improper acquisition is enough to constitute a misappropriation of a trade secret," and it is not necessary to show that United even used the information. Minuteman Inc. v. Alexander, 178 Wis. 2d 842, 844, 434 N.W.2d 773 (1989). Much of the above-stated argument by Sokolowski (that the information was not useful or not profitable or did not assist Sokolowski in preparing bids) goes to the issue of damages. These allegations do not establish that the information obtained by Sokolowski was not a trade secret.

Sokolowski makes the unsupported assertion that much of this information was available from public sources. Sokolowski, however, has not identified any public sources from which all of the information, in the form in which it was compiled, was available from public sources. In fact, Sokolowski cannot make such a claim. It is the specific information, compiled in the form in which it was compiled, that makes the information

valuable to Burbank and potentially valuable to its competitors. As the Eleventh Circuit Court of Appeals noted:

> The fact that some or all of the components of a trade secret are well-known does not preclude protection for a secret combination, compilation, or integration of the individual elements. Essex Group, Inc. v. Southwire Co., 501 S.E.2d 501, 503 (Ga. 1998) (quoting *Restatement* (Third) *of Unfair Competition*, §39(f) (1985). Hence, even if all of the information is publicly available, a unique combination of that information, which adds value to the information, also may qualify as a trade secret. (citation omitted)

Penalty Kick Management v. Coca Cola Co., 318 F.3d 1284, 1291 (11th Cir. 2003). Regardless of the allegations raised by Sokolowski, and although the names and potentially the addresses and phone numbers of potential Burbank customers could be discovered through public sources, the fact that Burbank compiled a list of its own customers, included contact information, frequency of pick up, and pricing information on its customer list, the fact that Burbank compiled a driver route profitability sheet that contained internal Burbank numbers that existed in that form nowhere else in the world, and the fact that Burbank prepared a spreadsheet for each particular load of industrial grease, including Burbank's internal cost numbers, establishes that the information obtained by Sokolowski, regardless of the form or how he obtained it, constitutes a trade secret.

At best, the allegations raised by Sokolowski and the United entities in their briefs in opposition rise to the level of a disputed issue of material fact. As the Eleventh Circuit in Penalty Kick Management noted, whether information constitutes a trade secret is a question of fact. Id., at 1291. Based on the information contained in the record to date, however, Burbank believes it has established through the undisputed facts that the information possessed by Sokolowski meets the definition of trade secret as established in §134.90, Stats.

Sokolowski makes the argument that the measures instituted by Burbank to protect the confidentiality of its secret information are not reasonable. (Sokolowski brief, p. 9). In support of this argument, Sokolowski notes that the Burbank employee handbook "did not contain any provision relating to use or disclosure of that information following termination of employment." (Sokolowski brief, p. 9). While it can be reasonably inferred from the language of the handbook that the company considered the information confidential, whether within or without the scope of employment, Sokolowski acknowledged the importance of protecting confidential information, knew that customer lists were considered confidential, and knew that they should not be disclosed to competitors of Burbank. (*See*, Burbank's brief in support of summary judgment, p. 13, citing Sokolowski's deposition, pp. 27-32.) For Sokolowski to now somehow argue to the court that he did not know that Burbank considered this information confidential following termination of employment would fly in the face of his deposition testimony. Obviously, Burbank's measures were reasonable because as Sokolowski himself testified, he knew the information should be kept confidential and not disclosed. Moreover, Sokolowski was subject to a higher standard than other employees by being asked to sign the Anamax Code of Conduct which stated that no "employee shall disclose any confidential or privileged information to any person within the company who does not have a need to know or to any outside individual organization except as required in the normal course of business." Certainly, this extra acknowledgment to Sokolowski makes Burbank's intent with its confidential information clear. It is the common law duty of Sokolowski not to disclose this information subsequent to his employment, and Sokolowski knew Burbank's intent.

With respect to the type of information that may constitute a trade secret, Burbank has cited in its brief in support of its motion for summary judgment not only the main post-UTSA Wisconsin case (Minuteman Inc. v. Alexander, 147 Wis. 2d 842, (1989)), but also cases from other jurisdictions which support the claim that different types of information, including that possessed by Sokolowski that belonged to Burbank, could qualify as trade secrets. The Wisconsin Supreme Court in Minuteman encouraged courts to look to the developing law under the Uniform Trade Secrets Act with respect to other jurisdictions interpreting a similar provision. Despite two opportunities to do so, neither the United entities nor Sokolowski have come up with citations to any case, other than Gary Van Zeeland Talent to support their claim that Burbank's information does not constitute a trade secret. Being a pre-UTSA case, Van Zeeland is no longer the legal standard in Wisconsin. Minuteman, 147 Wis. 2d at 852.

C. EVEN IF THIS COURT FINDS THAT SOME OF BURBANK'S CONFIDENTIAL INFORMATION DOES NOT RISE TO THE LEVEL OF A TRADE SECRET, BURBANK IS AFFORDED PROTECTION BY THE COMMON LAW DUTY OF AGENCY.

Again, there is no dispute that Sokolowski acknowledged customer information was considered confidential by Burbank. (Hermes affidavit, ¶6). There is no dispute that Sokolowski had a common law duty not to disclose this information, even after the termination of his employment. Hartford Elevator, *supra*. There is no dispute that Sokolowski disclosed this information to United Grease. (Hermes affidavit, ¶¶6 and 10.). The only cases cited by Sokolowski in his brief in opposition are Corroon & Black-Rutters & Roberts, Inc. v. Hosch, 109 Wis. 2d 290 (1982), Van Zeeland, supra, and Abbott

Laboratories v. Norse Chemical Corp., 33 Wis. 2d 445 (1967). Each of these cases, however, deals with the issue of trade secrets and does not specifically address an employee's duty of agency recognized in Hartford Elevator, *supra*, a 1980 Wisconsin Supreme Court case. Consequently, none of these cases is applicable to deny Burbank's claim that Sokolowski breached his duty. The duty is clear and the undisputed facts show that he breached it. Summary judgment is therefore appropriate as to this claim.

D. GIVEN THE UNDISPUTED FACT THAT SOKOLOWSKI DISCLOSED CONFIDENTIAL INFORMATION TO UNITED GREASE WITH THE HELP OF UNITED LIQUID WASTE, UNITED GREASE AND UNITED LIQUID WASTE AIDED AND ABETTED SOKOLOWSKI'S BREACH OF HIS AGENCY DUTY AS A MATTER OF LAW.

The United entities devote four full pages of their opposition brief (pages 3-6) to the Uniform Trade Secrets Act preemption doctrine. As noted above, Wisconsin law does not support the extension of such a preemption to the case at hand.

In the one paragraph devoted to an actual opposition to the aiding and abetting claim (United brief, pp.6-7), United does not deny Burbank's claim that a duty on behalf of United Liquid Waste and United Grease existed, nor do the United entities cite any case law to the contrary. In Burbank's brief in support of its motion for summary judgment (at p. 6), as well as in Burbank's brief in opposition to summary judgment by Sokolowski, United Grease and United Liquid Waste, Burbank cites St. Francis Savings & Loan Assn. v. Hearthside Homes, Inc., 65 Wis. 2d 74, 221 N.W.2d 840 (1974) in establishing an undeniable duty not to assist an agent to violate his duty to the principal. Id., at 81, 221 N.W.2d at 844. Given this duty, and given Sokolowski's acknowledgment that the information he maintained was considered confidential (Hermes affidavit, ¶6.), there can

be no dispute that the assistance provided by United Liquid Waste in the form of employees, funding, facilities, and computer network all aided and abetted the breach of the duty of agency in disclosing confidential information to United Grease. For this reason, summary judgment should be granted as to this cause of action against both United entities.

E. NO DISPUTED FACTS EXIST TO PRECLUDE SUMMARY JUDGMENT ON THE ISSUE OF COMPUTER CRIMES.

Sokolowski's only defenses to the computer crime cause of action are that although he did not get specific permission to take home customer list information, he was "authorized to do what [h]e needed to do to have the list and get [his] work done." (Sokolowski opposition brief, p. 2, quoting deposition transcript, pp. 50-51.) Sokolowski also states that Burbank never asked Sokolowski to return the computer data even though it had the opportunity to do so. These arguments do not rise to the level of a disputed material fact with respect to the essential elements of a computer crime. Consequently, summary judgment must be granted.

Even assuming as Sokolowski alleges that he had permission at the time he took the material to possess it, he did not have authority to take the computer information that he had and give it to United Grease, a competitive business. His own deposition testimony supports the contention that he knew this information was confidential and not to be disclosed. (Hermes affidavit, ¶6). Wis. Stats. §943.70(2)(a) provides in pertinent part:

> Whoever willfully, knowingly and without authorization does any of the following may be penalized as provided in pars. (b) and (c):
>
> . . .

3. Accesses computer programs or supporting documentation.

4. Takes possession of data, computer programs or supporting documentation.

5. Copies data, computer programs or supporting documentation.

6. Discloses restricted access codes or other restricted access information to unauthorized persons.

Sokolowski admitted to possessing computer information that would qualify as "data" as that term is used in §943.70(1)(f), Stats. Sokolowski acknowledged that he took the information to United Grease and that he and an employee entered that information into the computer system. (Hermes affidavit, ¶6; Bohlman affidavit, ¶3.). The act of taking the computer information and entering it into United Liquid Waste's computer system for the business of United Grease certainly qualifies as either "accessing" it at a time in which he did not have permission to do so under (2)(a)(3), "taking possession" of that data by United Grease at a time when United Grease did not have any authority to do so under (2)(a)(4), "copying" said data without authorization under (2)(a)(5), or "disclosing restricted access information" to unauthorized persons under (2)(a)(6). Regardless of how the court views the undisputed facts of this case, it must find that Sokolowski violated one of these provisions when he disclosed the information to his new company, United Grease. There can be no dispute that United Grease, a competitor of Burbank, had no authority to possess such information. For this reason, summary judgment must be granted.

F. IMPROPER INTERFERENCE WITH BURBANK'S BUSINESS RELATIONS HAS BEEN ESTABLISHED.

Sokolowski does not dispute that a cause of action exists for interference with a contract terminable at-will, nor does Sokolowski dispute that the contracts at issue in this case were implied contracts which were terminable at will. (Sokolowski opposition brief, p. 11.) Sokolowski's two main defenses to this claim are that the information he used to interfere with Burbank's contracts did not rise to the level of trade secret or confidential information such that he breached no duty nor misappropriated any trade secrets (Sokolowski brief, p. 11), and that he may avail himself of the "competitor's privilege" because the means he used to interfere was not "improper" as that term was defined by the Wisconsin Court of Appeals in Liebe v. City Finance Co., 98 Wis. 2d 10, 295 N.W.2d 16 (Ct. App. 1980).

Wisconsin J.I.-Civil 2780 is instructive on the issue of what constitutes interference. In pertinent part, the Jury Instruction states:

> An interference may consist of conduct or words conveying to (third party) the defendant's desire to influence (third party) to refrain from dealing with the plaintiff. It could be a simple request or persuasion, exerting only moral pressure, as well as threats or promises of some benefit to (third party). It does not require ill will or expression of malice towards the plaintiff.

Wis. J.I.-Civil 2780. Burbank maintains its position that a breach of a fiduciary duty constitutes wrongful means not subject to privilege as found in Brunswick Corp. v. E.A. Doyle Mfg. Co., 770 F. Supp. 1351, 1366 (E.D. Wis. 1991). Despite Sokolowski's attempt to distinguish this case from the present situation (Sokolowski opposition brief, p. 12), the Eastern District Court in Brunswick did find Wisconsin law to support the claim that a breach of a fiduciary duty constituted a "wrongful means," citing Harman v. LaCrosse Tribune, 117 Wis. 2d 448, 344 N.W.2d 536 (Ct. App. 1984). In part, therefore, Burbank's allegations that Sokolowski's interference was improper is based upon

his undisputed breach of his agency duty in disclosing confidential information of Burbank to his new company, United Grease.

As raised in Burbank's brief in opposition to the defendants' motions for summary judgment, by conveying to Burbank's customers that Burbank was engaging in an illegal dumping practice, Sokolowski also employed the requisite "improper" means as set forth in Sokolowski's opposition brief through the citation to Liebe, *supra*. (*See*, Burbank's brief in opposition to summary judgment, p. 14.) Sokolowski has absolutely no foundation for this scurrilous statement. (Hermes affidavit, ¶6.). Furthermore, the statements are not true. (*See*, affidavit of Donald Barnard in Support of Motion for Summary Judgment.) Such a fraudulent misrepresentation by Sokolowski, which he admits caused businesses to switch, must not be sanctioned and certainly falls within the protections afforded by a common law tortious interference claim. For these reasons, summary judgment is proper.

G. THE CONSPIRACY OUTLINED IN BURBANK'S COMPLAINT EXISTS.

It is undeniable that the potential for a conspiracy exists. None of the defendants has disputed that the cause of action exists or that the proof necessary to establish such a claim, as stated in Burbank's brief in support of summary judgment at page 20. The defendants all deny, however, that the conduct of the defendants amounts to a conspiracy.

Sokolowski has stated that he has solicited Burbank's accounts. The United entities have provided assistance in the form of money, manpower and equipment to assist in soliciting these accounts. (Hermes affidavit, ¶¶6 and 8.) The conduct of Sokolowski in conveying to certain accounts that Burbank was conducting illegal activity (Sokolowski deposition, pp. 56-61) provides the requisite level of "malice" to support the contention.

Given these undisputed facts, the conspiracy not only exists but exists as a matter of law. Summary judgment should be granted.

III. CONCLUSION

No matter how hard Sokolowski tries to persuade this court that the information that he improperly used was public knowledge and did him no good, it is undeniable that he used the information. Had he retained the information but did not use it, we would not be here. His own admissions, coupled with the long-standing law of this state, require this court to grant summary judgment as to the duty of agency, computer crime, and tortious interference claims set forth by Burbank. Consequently, the aiding and abetting, tortious interference and conspiracy claims against the United entities must also be upheld and granted summary judgment. Finally, with respect to trade secrets, while this claim is more difficult to prove than the others, Burbank has provided this court with enough undisputed facts to show that the information taken by Sokolowski and disclosed to United Grease rises to the level of a protectable trade secret regardless of whether he used the information or not. Such conduct is actionable and summary judgment is appropriate.

Respectfully submitted this 1st day of October, 2003.

METZLER AND HAGER, S.C.

By: _____

Michael L. Hermes
Attorneys for Plaintiff
WI Bar Member No.: 1019623
222 Cherry Street
Green Bay, WI 54301-4223
(920) 435-9393

STATE OF WISCONSIN CIRCUIT COURT BRANCH 5 DANE COUNTY

BURBANK GREASE SERVICES, LLC,
a Wisconsin limited liability company,

Plaintiff,

v.

LARRY SOKOLOWSKI;
UNITED GREASE, L.L.C.,
a Wisconsin limited liability company; and
UNITED LIQUID WASTE RECYCLING, INC.,
a Wisconsin corporation,

Defendants.

Case No. 02-CV-2397

Case Code No. 30303
Other Contracts

AFFIDAVIT OF DONALD BARNARD IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

STATE OF WISCONSIN :
: SS.
DANE COUNTY :

DONALD BARNARD, being first duly sworn on oath deposes and states as follows:

1. My name is Donald Barnard and I am the General Manager of Burbank Grease Services, LLC ("Burbank"). I am responsible for supervising the day-to-day operations of Burbank.

2. As part of my job duties, I am responsible for making sure that Burbank policies and procedures comply with the laws of the various states and municipalities in which Burbank does business.

3. I was present during the deposition of Larry Sokolowski which was taken on July 31, 2003. During the deposition, Mr. Sokolowski described what he believed to be an

illegal practice of Burbank in which its grease trap route service drivers would dump the contents of one grease trap back down the sewer at the next stop.

4. Burbank does not have a policy or a practice of draining solids, grease, and fat material from one grease trap down the grease trap of another customer.

5. Burbank's process for grease trap service is to remove all solids, fat and grease along with wastewater from a customer's trap, decant the wastewater, and drain only the wastewater down into the grease trap system. I did not believe that this practice of Burbank was illegal or improper.

6. Upon hearing the allegations of Mr. Sokolowski, I reviewed codes governing Burbank's conduct and verified with the Wisconsin Department of Natural Resources that no restrictions are placed upon the practice of Burbank in decanting and draining wastewater into the grease trap system.

7. The allegation made by Mr. Sokolowski that Burbank's conduct is illegal is untrue.

DATED this 1st day of October, 2003.

Donald Barnard

Subscribed and sworn to before me
this 1st day of October, 2003.

Notary Public, State of Wisconsin
My Commission June 19, 2005

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 5

BURBANK GREASE SERVICES, LLC,

Plaintiff,

Case No. 02-CV-2397

vs.

LARRY SOKOLOWSKI,
UNITED GREASE, LLC, and
UNITED LIQUID WASTE RECYCLING, INC.

Defendants.

AFFIDAVIT OF MARK H.T. FUHRMAN

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

MARK H.T. FUHRMAN, being first duly sworn, upon oath deposes and states:

1) I am an attorney licensed to practice law in the State of Wisconsin, practicing with the law firm of Bell, Gierhart & Moore, S.C., Madison, Wisconsin.

2) Bell, Gierhart & Moore, S.C., represents United Liquid Waste Recycling, Inc. and United Grease, LLC, defendants in this matter.

3) I make this affidavit in support of United Liquid Waste Recycling, Inc. and United Grease, LLC's Motion for Summary Judgment.

4) Attached hereto as Exhibit A is a true and correct copy of Plaintiff's Responses to Defendant Larry Sokowlowski's First Set of Interrogatories.

5) Attached hereto as Exhibit B is a true and correct copy of the Deposition

Transcript of Larry Sokowlowski, taken on July 31, 2003.

6) Attached hereto as Exhibit C are true and correct copy of the signature page of the April 25, 2001 Employment Agreement between Larry Sokowlowski and United Liquid Waste Recycling, Inc.

7) Attached hereto as Exhibit D is a true and correct copy of the Deposition Transcript of Robert Tracy, Jr., taken on March 20, 2003.

8) Attached hereto as Exhibit E is a true and correct copy of a CRIS printout I obtained from the Wisconsin Department of Financial Institution's website indicating that United Grease, LLC was organized on October 16, 2001.

9) Attached hereto as Exhibit F is a true and correct copy of Plaintiff's Response to First Combined Request for Admissions, Interrogatories, and Requests for Production of Documents of Defendants, United Grease, LLC and United Liquid Waste Recycling, Inc.

10) Attached hereto as Exhibit G is a true and correct copy of the deposition transcript of Timothy Guzek taken on June 30, 2003.

11) Attached hereto as Exhibit H is a true and correct copy of the deposition transcript of Brenda Mack taken on June 30, 2003.

12) Attached hereto as Exhibit I is a true and correct copy of the deposition transcript of Nicholas Manzke taken on June 30, 2003.

13) Attached hereto as Exhibit J is a true and correct copy of Anamax Group's Code of Conduct and Larry Sokowlowsk's acknowledgment.

14) Attached hereto as Exhibit K are true and correct excerpts of Burbank's April 1, 1999 Employee Handbook, including the cover page and pages 2, 53, 97, and 102.

15) Attached hereto as Exhibit L is a true and correct copy of the Deposition

Transcript of Bonnie Langsdorf, taken on June 30, 2003.

16) Attached hereto as Exhibit M is a true and correct copy of the Deposition Transcript of Brian Lodding, taken on March 20, 2003.

17) Attached hereto as Exhibit N are true and correct excerpt from the Exhibits marked during the July 31, 2003 deposition of Larry Sokowlowski.

18) Attached hereto as Exhibit O is a true and correct copy of correspondence from Attorney Michael Hermes to Larry Sokowlowski dated April 22, 2003.

Dated this 15 day of August, 2003.

Mark H.T. Fuhrman

Subscribed and sworn to before me
this 15th day of August, 2003.

E. Jeanne Bernlach
Notary Public, State of Wisconsin
My Commission expires 3/20/05

VERBATIM
REPORTING, LIMITED

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

= =

BURBANK GREASE SERVICES, LLC,
a Wisconsin limited liability
company,

Plaintiff,

-vs-

Case No. 02-CV-2397
Code No. 30303

LARRY SOKOLOWSKI, UNITED GREASE,
LLC, a Wisconsin limited liability
company and UNITED WASTE RECYCLING,
INC., a Wisconsin corporation,

Defendants.

= =

Deposition of:

LARRY SOKOLOWSKI

Madison, Wisconsin
July 31, 2003

Reporter: Susan Milleville

CONDENSED

TWO EAST MIFFLIN STREET • SUITE 102
MADISON, WISCONSIN 53703
MADISON: 608•255•7700 FAX: 608•255•7749 MILWAUKEE: 414•276•3886
1•800•255•7710 e-mail: verbatim@gdinet.com www.verbatim-madison.com

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

BURBANK GREASE SERVICES, LLC,
a Wisconsin limited liability
company,

Plaintiff,

-vs- Case No. 02-CV-2397
Code No. 30303

LARRY SOKOLOWSKI, UNITED GREASE,
LLC, a Wisconsin limited liability
company and UNITED WASTE RECYCLING,
INC., a Wisconsin corporation,

Defendants.

Deposition of:

LARRY SOKOLOWSKI

Madison, Wisconsin
July 31, 2003

Reporter: Susan Milleville

DEPOSITION of LARRY SOKOLOWSKI, a Defendant, called as a witness, taken at the instance of the Plaintiff, under the provisions of Chapter 804 of the Wisconsin Statutes, pursuant to notice, before Susan Milleville, a Notary Public in and for the State of Wisconsin, at the offices of Eisenberg Law Offices, S.C., 308 East Washington Avenue, City of Madison, County of Dane and State of Wisconsin, on the 31st day of July 2003, commencing at 9:30 in the forenoon.

APPEARANCES

MICHAEL L. HERMES, Attorney,
for METZLER AND HAGER, S.C., Attorneys at Law,
222 Cherry Street, Green Bay, Wisconsin, 54301,
appearing on behalf of the Plaintiff.

MARK H.T. FUHRMAN, Attorney,
for BELL, GIERHART & MOORE, S.C., Attorneys at Law,
44 East Mifflin Street, Madison, Wisconsin,
appearing on behalf of Defendants United Grease, LLC
and United Liquid Waste.

STEPHEN J. EISENBERG and PAM BAUMGARTNER, Attorneys,
for EISENBERG LAW OFFICES, S.C., Attorneys at Law,
308 East Washington Avenue, Madison, Wisconsin,
appearing on behalf of Defendant Larry Sokolowski.

Also Present: Don Barnard

INDEX

EXHIBITS

(The original exhibits were attached to the original transcript and copies provided to counsel)

(The original transcript was provided to Mr. Hermes)

(Exhibit Nos. 4 through 17 marked for identification)

LARRY SOKOLOWSKI,

called as a witness, being first duly sworn, testified under oath as follows:

EXAMINATION

BY Mr. Hermes:

Q Sir, could you state your name for the record, please.

A Lawrence S. Sokolowski.

Q And, Mr. Sokolowski, have you ever had your deposition taken before?

A Yes, I have.

Q How many times?

A One.

Q How long ago was that?

A I'm guessing three months ago.

Q What case was that involved?

A I believe it was a Tracey Brothers, LLC versus United Liquid Waste Recycling or something like that.

Q You have attended the various depositions that have taken place in this case to date, correct?

A Yes.
Q I will just, for the record, make sure that we're all on the same page today. I'm going to be asking you a series of questions, and I ask that you give me your best answer.
A Okay.
Q At the beginning of this proceeding, the court reporter made you raise your hand and made you swear to tell the truth. Do you understand that?
A Yes.
Q If for any reason you don't understand a question that I ask you, please tell me, and I'll try to repeat or rephrase the question. Is that understood?
A Yes.
Q The only other rule is to answer yes or no as opposed to shaking the head. Let me try to finish my question before you give the answer, and I'll try to offer you the same courtesy to let you finish your answer before I ask another question. Any reason we can't go forward this morning?
A No.
Q Have you reviewed any documents in preparation for your deposition today?
A No.

A No.
Q Where do you currently work?
A United Grease, LLC, Clyman, Wisconsin.
Q Do you have a title there?
A Manager.
Q Are you a member of that LLC?
A Correct.
Q Who are the other members?
A Bob Tracey, Jr., Jason Tracey, Bob Tracey, Sr.
Q What does United Grease, LLC do?
A We collect and process restaurant greases, industrial food waste and trap greases.
Q When was United Grease, LLC formed?
A I believe it was November of 2002. It was either 2001 or 2002.
Q When was your last day at Burbank Grease Services?
A I think it was May of 2001.
Q Does that give you any better indication as to when United Grease, LLC was formed?
A I think it would be November of 2001. No. It had to be 2002.
Q Throughout the course of this lawsuit we have learned that you used to work at Burbank Grease Services, correct?
A Yes correct.

MR. EISENBERG: Yes. You looked at your interrogatories.
Q Other than the interrogatory questions and answers, have you reviewed any documents in preparation for your deposition today?
A No.
Q Just briefly, Mr. Sokolowski, can you give me your educational background.
A High school and college in Whitewater. I did not graduate. I attended several MATC courses regarding waste water processing.
Q When did you graduate from high school?
A '79.
Q And when did you attend Whitewater?
A I think it was '79. I started right out of high school into college.
Q How long were you at Whitewater?
A Less than a year. About a year. Someplace in there.
Q How many courses did you take at MATC?
A I was an employee by the City of Fort Atkinson, so they sent us to class regarding waste water operations. How many classes I don't know.
Q Other than that, have you had any other education beyond high school?

Q How long did you work there?
A November of '97 through May of 2001.
Q Where did you work before that?
A I worked for Superior Special Services, Fort Atkinson.
Q What is Superior Special Services?
A We process food waste, liquid waste from various customers.
Q What kind of liquid waste?
A We did grease traps. A lot of sludges from food plants, municipal sludge.
Q When you say process food waste and liquid waste, does that mean you would also go out and collect it from these facilities too or just the processing?
A We collected it.
Q You collected and processed?
A Uh-huh.
Q Is that yes?
A Yes.
Q Were you an owner at Superior Special Services?
A Yes, I was.
Q Who else owned it with you, if anybody?
A It was a public company.
Q You owned shares of that company?

A I did.
Q How many other shareholders?
A There were hundreds.
Q How long were you at Superior Special Services?
A I would guess five years.
Q And when you left, what was your title and role with that company?
A Sales.
Q Did you have an agreement not to compete at Superior Special Services?
A Yes, I did.
Q In addition to that, did you have any sort of confidentiality agreements or nondisclosure agreements that prohibited you from disclosing what the company considered confidential information?
A Not that I recall.
Q When did you leave Superior?
A I left Superior at the time that I joined Burbank Grease.
Q November of '97?
A Correct.
Q What were the terms of the noncompete you had at Superior?
A A two-year noncompete agreement.

Q What was the name of that?
A It was called Valley Flower Environmental.
Q FLOWER?
A You got it.
Q What was Valley Flower Environmental?
A We did liquid waste.
Q Similar to Superior?
A Yes. Same thing. Superior bought Valley Flower.
Q How long did you have the company Valley Flower?
A I'm guessing four or five years.
Q Did you work anywhere before Valley Flower?
A City of Fort Atkinson.
Q Was the City of Fort Atkinson job your first job after Whitewater?
A Correct.
Q Who were your competitors at Valley Flower?
A Same ones.
Q As you listed for Superior?
A Correct. Uh-huh.
Q Is that yes?
A Yes.
Q What types of customers did you have at Valley Flower?
A Septic residential, food restaurants, industrial food processing facilities and municipalities.

Q Was it customer specific or did you have a certain area or radius you had to refrain from?
A I don't recall specifically. I think there was a radius of 50 miles or something like that.
Q What were you prohibited from doing within that radius?
A Directly competing or indirectly competing with them.
Q Who were competitors of Superior at the time you were there?
A Waste Management, several liquid waste hauling companies, Advanced Waste, Testmore (phon) Suffix Service, Tracey and Sons. There was probably several more.
Q Did your job at Burbank cause you to compete with Superior?
A At times I would say that it did.
Q Did Superior ever do anything about that?
A Before I exited Superior, I talked to the CEO and told him of what my intentions were with Burbank and what their business was. He gave me a green light that there would be – that they would not view that as competition per our agreement.
Q Where did you work before Superior?
A I had my own company.

Q What did you do for the City of Fort Atkinson?
A I was a waste water operator at the waste water plant.
Q How long did you work there?
A Eight to nine years.
Q At Valley Flower did you have any other people that worked there with you, employees that you had selling or soliciting customers?
A None that solicited customers. It was just myself and I believe towards the end I would say we probably had five, six employees.
Q What types of things did those employees do?
A Drive truck.
Q Did you have any agreements with any of those employees not to compete with you or not to disclose confidential information?
A No.
Q All right. Let's talk about your employment at Burbank. You said you started, I believe, November of '97. How did you come to work for Burbank?
A I was solicited by one of the owners of Burbank, Keith Olson, to come to Burbank to help them because they were experiencing rapid growth.
Q How did you get to know Mr. Olson?

A Superior had done work for Burbank. I would loan them trucks and things like that.
Q You said Mr. Olson was one of the owners. Who were the others, do you know?
A I believe Wayne Sadek, Jr., Will Sadek and Wayne Sadek, Sr.
Q What did Keith Olson hire you to do?
A I was director of operations.
Q What does that mean?
A Means I would oversee the plant operations as well as the collection and transportation side of the business.
Q To whom did you report at that time?
A I reported to Keith Olson.
Q You considered yourself management of Burbank at that time?
A Yes.
Q Who else would you have considered at a similar level at that time, anybody?
A No.
Q How many employees did you have reporting to you when you first started?
A About 60.
Q Can you list categories of employees; plant employees, office employees, that sort of thing?

from people who were not Burbank employees?
A That's a good question. The employees were told -- the sales people carried the information with them, and they were just told not to leave a book laying around in your travels.
Q Why was that? Why were they told not to leave it laying around?
A They didn't want to -- one was the problem of reprinting those. They were really a problem to reprint with the old computer system. Another was that it just listed the customer names on there. It did not have any pricing or anything.
Q But who told the sales people not to leave the customer list laying around in their travels? Was that you as director of operations?
A No.
Q Who told them that?
A Keith Olson. These people were in place before I was hired.
Q When did you learn in your tenure at Burbank that Mr. Olson had told the sales people not to leave the customer list laying around?
A I don't recall.
Q Other than the names of the customers on that list back in November of '97, were there addresses,

A There would be processing plant employees, sales employees, office employees, maintenance employees and transportation employees or managers.
Q And you said employees or managers. What kind of managers were there?
A You had the drivers and then like a manager that would route the vehicles.
Q Was that Brian?
A Yes.
Q Did he report to you as well?
A Yes.
Q When you were hired at Burbank by Keith Olson in November of '97 as the director of operations, --
A Uh-huh.
Q -- did Burbank have an existing customer base at that time?
A Yes.
Q How was that information kept at Burbank?
A The information was kept on a computer system and on printed paper.
Q Did you have access to that customer list?
A Yes.
Q Did you use it as director of operations?
A Yes.
Q How was it protected, if at all, from disclosure

phone numbers, contact people, anything on the list that you recall?
A I believe addresses and possibly a phone number.
Q So Mr. Olson considered that information, the address, the phone number, customer name on that list in November of '97, as something that the company wished to keep confidential, correct?
MR. EISENBERG: I guess I would object as to foundation as what he thinks Mr. Olson thought.
You can answer it.
A Generally yes.
Q And you knew that at the time that you were hired, correct, or shortly after?
A It was something that wasn't discussed. It was just basically common knowledge, I would say.
Q Common sense? You should not let somebody have access to your customer list, correct?
A Yes.
Q Who were the competitors of Burbank at that time?
A National Byproducts, Darling International, Kaluzney Brothers, Mahoney Grease Service. With the grease traps there would be all kinds of -- hundreds.
Q Smaller septic hauler type?

A Yes. That was at the beginning of my employment at Burbank.
Q And that's kind of what we were talking about. Thanks for making sure we're clear. Were there any written policies in effect at that time, employee handbooks or other policies?
A There was an employee handbook.
Q Did that have any provisions in it that related to disclosure of confidential information that you're aware of?
A Not that I recall.
Q Has that book been updated since November of '97?
A Yes.
Q Do you have any of the older versions anywhere?
A Not that I'm aware of.
Q How many sales people were there at Burbank in November of '97?
A Four basic sales people or more full-time people. Then there was other people that would help out from time to time, maybe one or two additional.
Q At the time you left Burbank, were you still director of operations?
A No. I was territory manager.
Q When did that change come about?
A I would say six months prior to my exit.

Q Were there some subsequent larger changes, personnel changes, anything like that, policy changes that you recall?
A Not that I recall at least for the 6 to maybe 12 months.
Q And then is there something that you recall after that?
A Anamax wanted to combine the Green Bay operation with the operation in DeForest and form a unified company which meant revamping of the handbooks, insurance policies, benefits, et cetera.
Q What about computers? Did anything change with respect to the way information was kept on computers at Burbank after Burbank was acquired by Anamax?
A After they were acquired they made changes.
Q What kind of changes do you recall?
A They networked the computers.
Q And when you say networked, do you mean networked within Burbank's facilities or networked within that facility and some other facility?
A Originally I believe it was networked within Burbank, and then they expanded that to the Green Bay operation.
Q Were there changes in the customer list and the

Q How did that happen?
A Anamax Corporation was rearranging everyone's duties.
Q To whom did you report then once you became territory manager?
A Tim Guzek.
Q Was there somebody at the time you became territory manager who was then called the director of operations?
A No. Keith had gone. They were trying to fill that position.
Q When did Anamax acquire Burbank, do you know?
A I don't know the exact date.
Q We have thrown out a date in the past of September of 1998. Is that approximately when --
A Yes. No. It was after that.
Q It was after that?
A Had to be after that. I think it was closer to the year 2000. I could be wrong. I don't recall the exact date.
Q That's okay. Whenever that date was, do you recall any other changes that were made or any new things that happened at Burbank as a result of them being acquired by Anamax?
A Initially there were no changes.

way that that information was kept on the computer after Anamax acquired Burbank?
A Yes.
Q How so? What were the changes?
A The computer system that we had at Burbank was an old DOS type system, so they converted the customer database into an Excel format, and, you know, just transferred that information into an Excel format.
Q Was there a particular program that's used at Burbank?
A It was called -- I can't remember the old program.
Q Eventually did the GTEP program come into use?
A Yes.
Q Was that the new one that you were talking about, the Excel format?
A Yes.
Q Did you have the ability to access the customer information stored on the GTEP program?
A Yes.
Q Who else had the ability to access that information at Burbank when you were there?
A When I was there, all the sales people and the office -- pretty much anybody in the office could access it.

Q What did you have to do to access it?
A On the computer -- I'm trying to think back. You could go into a section of GTEP and open the file with a customer list in it and sort it alphabetically or by phone number, et cetera, and you could print off the list by just hitting the print command. However, the list was several hundred, hundred pages long, so it would be printed on a -- it was just not practical to print the list.
Q Did you need a password to access the GTEP program?
A You needed the password, I believe, just to get on your computer. I'm not sure about the GTEP. I don't recall.
Q Do you recall any of the names of the office people who had access to the GTEP program while you were there?
A Brenda Mack, Brian Lodding, Jane -- I can't think of her last name. I believe Bonnie Langsdorf. Nick Manzke, Dick Wolf. I think one of the drivers could also access it, Dan Peters. There may have been one or two more. I don't know.
Q How about before this GTEP program? You talked about the sales people had a customer list.

Q Were you aware of any policy of destroying the old one in exchange for a new one?
A No.
Q What type of information was stored for customers in the GTEP program?
A Name, type of service, whether it was trap or fry grease or industrial, address, phone number. Some listings had a contact person but most did not. And the sales person responsible.
Q Any price information?
A They had price groups for the accounts. A lot of Burbank's accounts were flat rate pricing. So in a group it would be $30 per pick up. Another group would be $45 per pick up, et cetera.
Q Do you know what determined whether some were $30 or some were $40?
A It was the frequency of the pick ups. I'm referring to fry grease pick ups.
Q Did the type of information stored on those customers contain the frequency for each customer?
A Yes.
Q Did you have any role as territory manager in setting prices that Burbank would charge its customers for pick up?
A Yes and no.

A Uh-huh.
Q You were present for Nick Manzke's deposition --
A Uh-huh.
Q -- in which he testified that he got a list after awhile, and, if he wanted a new one, he had to do something with the old one, give it back or something like that. Do you recall that testimony?
A Yes.
Q Do you know what the process was before GTEP with the customer list?
A No, I don't.
Q Did you keep one in your office?
A I had an old customer list, correct.
Q Did you ever update that list before GTEP while you were at Burbank?
A No.
Q Were you ever responsible for sales people updating their lists before GTEP?
A Not directly.
Q What do you mean?
A One of the office gals, Lois Ford, would print them off a list and update it occasionally.
Q What would she do with the old one?
A I do not know.

Q Okay. Explain that one for me.
A All right. The main pricing structure was given to us by Tim Guzek in Green Bay --
Q Okay.
A -- after he reviewed financial information and decided or determined what the costs were for picking up the customer. Basically we were dictated to put those accounts in these price groups.
Q Do you know how many price groups there were at the time you left?
A Specifically with fry grease I would say there was probably three price groups, and with grease traps there were two price groups.
Q What determined price on the trap service?
A The size of the grease trap. Generally they charged per gallon. So the size was a 1,000 gallon tank, the price would be $160. 16 cents a gallon was one price group. The other price group for larger type traps was 12 cents a gallon. The third would be inside grease traps. New accounts were $125 per service. There were some existing old accounts that may have been less than that that we were in the process of raising those rates.

Q Did the information on the customers in GTEP contain size of traps?
A Yes. But most of them were incorrect.
Q How so?
A The drivers would estimate the size of the grease trap. There were no flow meters or measuring devices on the vehicle which they could -- there was a level gauge, but it was usually very inaccurate on the trucks. That was part of my job was to try to figure out all of the grease traps and what the actual sizes were so we could adjust the pricing and make them so the customer was getting charged properly.
Q I guess I never asked you this back when he we talked about you being territory manager. What does a territory manager do or what did you do?
A I oversaw the other sales people. Since I did it for such a short period of time, I also took care of relations with the industrial accounts and did spreadsheets and billing for our accounting department to bill the accounts out correctly.
Q When you say spreadsheets and billing, was that information for bills sent out of Burbank's DeForest location or was that information conveyed to Green Bay to send out?

and it was another way for me to track the incoming pounds of material in the plant. Towards the end of when I left Burbank, they had gotten that system where the scale ticket would be inputted into the GTEP system and it was actually starting to work.
Q As territory manager you said you oversaw other sales people and took care of industrial account relations. Did you have any oversight of plant employees during the processing end of things?
A Generally no.
Q Who was responsible for that?
A When I left, Mike Spahn was in charge of overseeing the plant and the transportation.
Q One of the things you mentioned, Mr. Sokolowski, was update of employee handbooks after Anamax acquired Burbank; is that correct?
A I don't recall mentioning that.
Q Did they do that?
A They did update the employee handbooks from time to time.
Q I'll show you what's been marked as Exhibit 4. I'll represent to you that these are just several selected pages of a larger employee handbook. Do you at least recognize the cover page as being a

A Conveyed to Green Bay.
Q And when you said spreadsheets and billing, what type of customers was that? Was that industrial or was that everybody?
A An industrial customer I would send or print off a spreadsheet and fax it to Green Bay for them to bill that customer.
Q So that was industrial?
A Uh-huh.
Q Did you do others, spreadsheets and billing for other types of customers?
A Generally no.
Q Who did that?
A The information was input in the computer by an office person who received the route ticket or trip ticket from the driver. So the driver would turn in his paperwork to the office, one of the gals would enter the paperwork in the computer, and it would just be coded for the price group and they would be billed accordingly with the GTEP system.
Q Why was it necessary for you to get spreadsheets on the industrial accounts to send them to Green Bay?
A Because that part of the system was not working,

Burbank handbook at least as of April 1 of 1999?
A Yes, I do.
Q Did you receive a copy of the handbook with a cover page that looked like Exhibit 4?
A I believe so.
Q Did you receive that while you were employed at Burbank Grease Services?
A Yes.
Q Turn to page 104, which is the fifth page of Exhibit No. 4.
A Okay.
Q There's a section here on Nondisclosure?
A Uh-huh.
Q Do you recall ever reading, understanding or knowing the information contained on page 104 while you were an employee of Burbank?
A I recall reading the information.
Q Any questions about it that you had at the time you read it?
A No.
Q When you got the handbook, did you intend to abide by the provisions in the handbook in general?
A Yes.
Q Do you recall when you might have first received the handbook that contained information about

nondisclosure in it?
A No.
Q The date on the first page of Exhibit 4 says April 1 of 1999. Do you have any recollection of receiving a handbook around that time?
A I would say it probably was around that time.
Q So at least around the time of April 1 of 1999 you said you understood that certain things were considered by Burbank confidential business information which included customer lists. Is that a fair statement?
MR. EISENBERG: Well, I guess I'm going to object. I think it says what it says. If he understands that –
MR. HERMES: That's what I asked him.
MR. EISENBERG: Whether he can draw a legal conclusion as to what it means I object to.
Q This isn't a trick. Did you understand at the time that the customer lists were considered confidential business information by Burbank?
A Yes.
Q Okay.
MR. EISENBERG: I object on that. That calls for a legal conclusion. Whether

can say yes, I understand that's what these words say. As to the legal meaning to him – I think it's an inappropriate question, and I don't think he's qualified to answer it.
With that, please go ahead.
Q Mr. Sokolowski, again, I'm not asking you what Judge Nicks is going to decide is a trade secret. I'm asking you at the time that you read this, did you understand that Burbank thought these items were either confidential or a trade secret, whatever a trade secret is?
MR. HERMES: Your objection is noted, Steve.
MR. EISENBERG: My last objection –
MR. HERMES: Come on.
MR. EISENBERG: But you're trying to pin him down. It says what it says. Foundation. He can't testify to what Burbank thought at all.
With that, you can answer the question. Did you think that's what Burbank thought?
THE WITNESS: I thought that they felt that was confidential information.
Q And as confidential information, you wouldn't want to disclose that information to potential

that means it's a trade secret is not something he's qualified to answer. My objection is noted.
Q Mr. Sokolowski, this document, page 104, uses the term "confidential business information" and it also uses a term "trade secrets."
A Yes.
Q Would you agree that those terms are contained on the page?
A Yes, they are.
Q Would you agree that there's a list of bulleted points underneath that paragraph?
A Yes.
Q If you read that, did you understand that to mean, whether or not a judge would decide that, that Burbank considered that information either confidential business information or trade secrets?
MR. EISENBERG: Again, you're asking him to make an ultimate conclusion of law.
MR. HERMES: I'm not.
MR. EISENBERG: Let me put in my objection. Whether he knows that to be a trade secret – they can call whatever they want a trade secret and it ain't in our belief. He

competitors, correct?
A Correct.
Q As a director or a territory manager – well, let me back you up. Was there a code of conduct document that you were also required to review by the Anamax group after they purchased Burbank?
A Yes. And we were required to sign the document as well.
Q I'll show what's been marked as Exhibit No. 6. Take a look at that. Is that the code of conduct document that you referenced?
A I believe it is.
Q And you mentioned that you were required to sign. I'll show you what's been marked as Exhibit 5. Is that a code of conduct acknowledgement form, Exhibit 5?
A Yes.
Q And did you sign that?
A Yes, I did.
Q And that's your signature as it appears on Exhibit 5?
A Correct.
Q With the date of October 14, 1998; is that correct?
A That's correct.

Q Did you read through the code of conduct?
A At the time when this document was signed by myself and several others, we were all brought into a conference room such as this. All the office people were told to read the document and sign it and after that we were going to go and do other business. I believe everybody in the room read the document. I don't know if it was myself or someone else asked what happens if you do not sign this. The answer was, "You want to sign this document. You have to sign this document." And at that point everybody signed the document. That was it.
Q You said it was all the office people?
A As I recall.
Q Do you know who might have been in the room in that conference room that day?
A I believe Lois Ford. I think Lynn Parks, Brian Lodding, Brenda Mack. I believe Nick Manzke and, of course, myself and an employee from Anamax, the human relations person.
Q Do you know who that was?
A I'll think of it.
Q Man or woman?
A Kristine. There may have been one or two others

person within the company who does not have a need to know or to any outside individual or organization except as required in the normal course of business, you perceived Anamax to be serious about that particular provision, correct?
A Yes.
Q What did you consider confidential information at the time?
MR. EISENBERG: 1998?
MR. HERMES: When he signed it.
A I would say information regarding financials. Any data that would have -- I guess I don't know.
Q Well, we already talked about the customer list back in 1997. You agreed that that was considered confidential at the time, correct?
A Uh-huh.
Q Is that yes?
A Uh-huh, yes.
Q At the time, '98, did you still consider the customer list confidential information?
A Yes.
Q When you signed Exhibit 5, you signed it in good faith that you were going to honor the code of conduct, correct?
A I would say we signed it because we were forced to

in the room as well. The way I perceived the code of conduct was that you either sign this or you can look for employment elsewhere.
Q So Anamax was serious about the information contained in this code of conduct, correct?
MR. EISENBERG: Again, I'm going to object to what Anamax thought. He doesn't know what Anamax thinks.
Q Did you perceive Anamax to be serious about the information contained in this code of conduct?
A I perceived the human relations person to be serious about it.
Q They made a big deal about you coming into a conference room and signing this document or else looking for other employment, correct?
A Correct.
Q So at the time you signed it on October 14 of 1998, you knew that Anamax considered disclosure of confidential or privileged information to be not acceptable, correct?
MR. EISENBERG: Same objection. You can answer it. Foundation.
A I knew what the document said.
Q And if it says no Anamax employee shall disclose confidential or privileged information to any

sign it. But generally we all figured we would follow the code of conduct.
Q At the time you figured you would follow the code of conduct, correct?
A Uh-huh.
Q Yes?
A Yes.
Q And you knew that if you didn't, there was a good chance you would lose your job, correct?
A That's correct.
Q At some point though you decided Burbank's not the place for me, correct?
A Correct.
Q What made you come to that decision?
A I felt that the company was -- their alignment with my views on how to operate the company was not the same as my view, so I figured it was time to move on.
Q When did you come to that decision?
A It was probably March, I would say of 2002, I believe.
Q You left in 2001?
A 2001.
Q The March before you left?
A Right.

Q What did you do to go about preparing for your departure? Did you look for another job?
A I looked to get another job. Correct.
Q Who did you look with or how did you go about looking for another job?
A I have a lot of connections in the waste business, and I checked with several different companies that are out there to see what work was available.
Q Who did you check with?
A I believe I checked with Superior Services. I checked with several friends that have waste hauling companies. I decided to work with a company called United Liquid Waste Recycling.
Q Whom did you contact there?
A Robert Tracey, Jr.
Q Had you known Bob, Jr. before you decided to leave Burbank?
A I knew him from competing against them with the Superior Services company.
Q Do you recall when you first talked to Bob, Jr. about leaving Burbank?
A The date or --
Q The first question, yes, is the date.
A I would say it was during March.
Q How did that meeting go?

Q Do you remember the number?
A No.
Q Who was your provider?
A I do not know.
Q Was it a Burbank phone?
A It was a Burbank phone.
Q Did Mr. Tracey have a cell phone?
A I don't recall.
Q Do you ever recall having any conversations with him on the cell phone?
A No.
Q All right. So you knew Bob Tracey, Jr. What did you tell him you would do in terms of his business?
A Well, he asked me what I could do. It was, as I mentioned, sales, to increase their revenue.
Q Did you guys discuss a plan of how you would go about doing that?
A No.
Q Did you have a plan about how you would do that?
A I had ideas of what would work and what might not work.
Q What were those ideas?
A The ideas were to target large municipal waste water plants and large food corporations that had

A Their company is relatively new. I think it was only about a year, maybe a year and a half old. He knew my ability to get large industrial accounts and to really boost the sales, so I was looked upon favorably by them to come in and help them out to grow the company.
Q Was United Liquid Waste a competitor of Burbank at that time?
A Yes and no. They do pump some grease traps. Pretty much localized.
Q How did Bob, Jr. know of your ability to get large industrial accounts?
A Because I competed with him with Superior Company.
Q This first discussion that you had with Bob, Jr., was that face-to-face or on the phone?
A I don't recall.
Q Was it during the day or after work?
A It would have been, I believe, -- I don't recall.
Q Did you ever send any Emails back and forth between yourself and Bob, Jr. before you left Burbank?
A No.
Q Did you have a cell phone at the time, say the last two months you were employed at Burbank?
A I believe so.

the need for waste disposal.
Q Did you have any lists of potential customers in March of 2001?
A The list I would say would be a listing from the Wisconsin Waste water Works Operators Association of all of the municipal waste water plants in the state of Wisconsin.
Q Let me try that again. Did you have in your possession a list of potential customers that you created?
A No.
Q Nothing in March of '01?
A Of customers that I created?
Q A list of potential customers that you sat down and either typed on a computer or wrote up or had a bunch of papers that you highlighted names on. Any sort of list that you compiled of --
A Not that I recall.
Q At some point you had to do that, correct?
A Yes.
Q When did you do that?
A I really never did that specifically. I just went from day to day and would make phone calls and find out who had the need for our services.
Q At some point you had to track down these phone

numbers?
A Uh-huh.
Q Yes?
A Yes.
Q How did you do that?
A Over the Internet or phone books or information.
Q When did you start tracking down these customers for sales at your new job?
A Probably 30 days after I started employment.
Q When did you start employment?
A It was shortly after I left Burbank.
Q Do you recall specifically?
A No.
Q If you left in April of 2001, did you start work at your new company by June of 2001?
A At the United Liquid Waste company?
Q Yes.
A I think so.
Q Did you start it by May?
A I don't recall.
Q How many times before you left Burbank did you talk to or meet with Bob Tracey, Jr. about getting together?
A I'm guessing -- before I left Burbank?
Q Yes.

Q So sometime during those three conversations you had with the Tracey brothers --
A Uh-huh.
Q -- it was decided that you would go to work for United Liquid Waste?
A Right.
Q And did you have a written employment contract with them?
A Yes.
Q Did you discuss with them any information that you would be bringing with you from Burbank?
A No.
Q Did you bring information from Burbank with you?
A Not originally. I had old information that I had at home that I worked on for Burbank that got stuck away in the closet and just kind of stayed there. So that information was there and not used for some time.
Q So you said not originally. At some point did you bring some information with you from Burbank to use at United Liquid Waste?
A At United Liquid Waste no.
Q Once you formed United Grease, did you bring information that you had from Burbank with you to use?

A I would say three times.
Q Any of those meetings occur over the phone?
A It's possible. Generally it was in person.
Q Did you meet at any specific place?
A At his facility in Clyman.
Q Anybody else present besides you and Mr. Tracey, Jr.?
A I believe Jason Tracey.
Q What relation is Jason to Bob, Jr.?
A Brother.
Q Let me back up. At some point you and Mr. Tracey, Jr., and maybe some others, decided to form United Grease, correct?
A Correct.
Q How did that decision come about?
A The decision was when I originally started working for them, we had an agreement that said if I did -- I forget if it was $1 million or $2 million in sales or something, we would look at starting a new company, whether it was a grease company or another company or whatever. I wanted to have an equity partnership in a company. At that time we did not -- I don't believe we determined whether it was a grease company or a food company or whatever.

A After I think several months.
Q After several months of operation as United Grease?
A Uh-huh.
Q Is that yes?
A Yes.
Q You said you had some old information that you had at home.
A Uh-huh.
Q What types of information did you have at home?
A It was information about projects that I had worked on at home for Burbank Grease generally. So it would be spreadsheets, documents, job descriptions, flowcharts of employees at Burbank. Things of that nature.
Q Why did you work on these things at home?
A Because I did not get enough time to get it completed at work.
Q Over what time period were you working on things at home for Burbank?
A Since my employment.
Q What did you have at home for a computer?
A Just a little PC.
Q What kind?
A A Compac.

Q Do you still have it?
A No.
Q Where did it go?
A The hard drive crashed on it probably about three years ago. Maybe not that long ago. It was disposed of.
Q Since the lawsuit started?
A I believe it was prior to the lawsuit.
Q Did you get permission from anybody to take information from Burbank home?
A I was authorized to work on things at home as were several other people.
Q Who else?
A Mary Jo Gallagher, Mike Spahn, I believe, and Brian Lodding.
Q Who gave authorization?
A Brenda Mack I think as well.
Q Who gave –
A Anybody that was doing work in the office that needed – there was a lot of special projects Anamax would come up with that required a lot of work in a short period of time. You had deadlines to meet. So the only way you could get that done was to work on it at home or if you had the capability or spend a lot of hours in the office.

accounts, compiling projected poundage market rates and so on. And then there was another program called the Impact Program which Anamax implemented which was a program designed to enhance profitability of the entire company. So there were several projects to deal with that.
Q Such as?
A Interview questions for new hires, job descriptions that would all come from myself or other managers that had to be developed basically so they had standardization of all of these items. So I would work on those documents a lot at home actually and then bring that information back to work.
Q Did you ever bring any type of customer list home?
A Yes.
Q How often?
A I had a grease trap listing only that I was working on for the pricing of the grease traps, and I acquired that because it was a large list. I printed that off I think it was in December or November of 2000. I think it was 2000 or 2001. The list just had – it just said service and it said grease trap. I had worked on it at the office as well as at my house, so it was missing

So I would transfer the data onto a disk and then bring it back to the office to do printouts and spreadsheets and so on.
Q Who gave the authorization for you to do work at home originally?
A Tim Guzek, Mike Langenhorst. They were well aware that we were working on documents at home.
Q How were they aware?
A When we would have our weekly meeting, we would tell them we're working on this and working on that. I assume that they were fully knowledgeable in that. They had to know.
Q Well, let's back up. You said they were aware. Then you said you assume they were, and now you say they had to know. Do you know which one it is?
A I mentioned to Mike and Tim that I had worked – I had spent a lot of time on these things at home on several different documents.
Q Which documents did you tell them you were working on at home?
A The pricing structure for the grease traps. We were trying to get the correct sizing of the traps so the customers could be charged properly. For the budgetary numbers for all of the industrial

several sheets out of it. I would say it was probably 400 sheets. The list had probably six names on each sheet. The list had the customer name, a customer number, the address, the sales person from Burbank, every one is Nick Manzke, and sometimes a contact and sometimes not a contact. Then under pricing, if it was a small restaurant, it would list what the pricing was. But for all the chain accounts, restaurants that didn't -- it just said chain. It didn't give any pricing. Any large accounts it did not have any pricing on it. For an industrial account or something it would just say byproduct waste large industrial trap account or something like that. It didn't have any pricing.
Q You testified a little bit ago that you took home the customer list and it was trap only.
A Uh-huh.
Q You took it home to determine correct pricing, correct?
A Correct.
Q So while you were home, what were you doing with the list?
A On the list with most of the accounts it would list the total amount of gallons on the grease

traps. So what our mission was was to determine that the gallons are correct on the trap to match the correct pricing. If a trap was being charged $160, it should have been a 1,000 gallon grease trap. When you saw a listing that said 3,000 gallons, you knew that that customer was not being charged correctly. Those items were then – I would bring those back in and change the pricing in the GTEP system, the ones that I would uncover that were out of wack.

Q What would you do at home to uncover that this pricing was out of wack?

A Simply go through the list.

Q And look at the number of gallons listed on the –

A Versus the pricing. Correct.

Q You just testified a few minutes ago that for small accounts the pricing was listed but for chain accounts there were no pricing listed; is that correct?

A Correct.

Q Then how did you make the determination if those were –

A I couldn't on the chains.

Q How were chain accounts priced when you were there?

did you get permission from anybody to do so?

A Specific permission?

Q Yes.

A There was no manager there at the facility other than Tim Guzek, and he was in Green Bay. No, I did not get specific permission from him. However, we were authorized to do what we needed to do to have the list and get our work done.

Q What period of time were you working on this trap only customer list at home?

A It would have probably been, I would say, from that December point – actually before that. I started the project probably in September or October, someplace in there. Then because the list kept changing, I would print out maybe a new list every month or so so I could update it to get the correct information. So from that December period when I had that list, I kept working on that until I would say probably February or so changing pricing or looking at which accounts were out of wack.

MR. FUHRMAN: What year was that?

THE WITNESS: That was 2000. The dates – I'm getting messed up on the dates. I left in 2001, so it was the year 2000. It

A They were in a price group. They were not printed on the list I had. As far as I know, they were on a group. In other words, a chain account would usually be charged a flat rate. So, for instance, Wendy's, they would charge them maybe whatever the X amount of dollars but all the stores would be charged the same.

Q Did you also have a list of what those chains were charged?

A No.

Q Were you able to remember without having a list what the various chains were charged?

A Relatively close, yes.

MR. EISENBERG: Take five?

MR. HERMES: Yeah. Now is a good time.

(Discussion off the record)

(Recess)

Q All right. Mr. Sokolowski, before we took a break, we were talking about your work at home –

A Uh-huh.

Q – on the trap only customer list; is that correct?

A Yes.

Q Before you took that list home to do work on it,

would have been those months.

MR. FUHRMAN: Okay.

Q So you indicated that you were correcting or changing pricing that – your term was out of wack.

A Yes.

Q Did you then on that list change the price?

A I would bring a sheet or two back to the office and then change the price or give – I would make a note to Brian Lodding who would actually enter it into the GTEP system to change it or maybe Brenda Mack. It depended. It would be myself, Brenda or Brian probably that would actually say this is out of – I would call the customer, tell them that, you know, you're not being charged appropriately. We need to do this. Then I would tell Brian about either the frequency needed to be changed or the pricing because of the trap size and so on.

Q On the list you had you were able to determine whether the frequency or the trap size was correct?

A I don't recall if there was frequency on there. You would have to look that back up in the computer to see what the actual frequency was. I

think on the list they just had a code or something, but you couldn't tell what frequency it was. It had like a number, a real long number. You couldn't decipher if it was every week or every three weeks.

Q How were you able to change the pricing if you didn't know that information on the list at home?

A Because the frequency didn't have a lot to do with the trap pricing. It was basically size of the grease trap. So if the size said 1,000 gallons, like I said, and they were being charged $500, they're being way overcharged, and, conversely, the other way around.

Q So in order to tell if they were being charged correctly, the list you had had to have two things on it. It had to have the trap size and the current price, correct?

A Correct.

Q Then once you figured out that a company was being charged incorrectly, you would either update or have somebody update the price on the list, correct?

A I would usually call the customer to confirm that the pricing was going to change and okay it with them. Either you lose the customer or you would

or Mike Langenhorst would direct us to come up with budgetary numbers and things like that in a short period of time, there was no way you could get that information done at the office. So you would have to take it home, work on it, bring it back in and then compile the reports that they requested.

Q Are you able to tell me any other types of projects that you worked on at home?

A For?

Q For Burbank. We talked about the pricing. We talked about job interview questions and employment description.

A I did job descriptions. Right. Interview things. We worked on, like I said, the budgetary numbers for projected pounds coming in. I think also I might have worked on some transportation costing items. Let's see. Going back earlier, the plant electrical usage, consumption of the processing, things like -- I think even things as far as fuel mileage for vehicles. I don't know. That's all I recall.

Q Tell me about the one item I'm curious about, the transportation costing. What do you remember doing at home?

retain the customer if in fact there was a large increase. Usually I didn't make too many calls regarding decreases.

Q When did you conclude that project?

A I never really concluded it. There's probably still several hundred customers that are being charged incorrectly unless Don's got it all squared away. A lot of the trap sizes that were on that list are inaccurate as well. Just because of this impact study through Anamax -- it was just an efficiency, trying to put more money in the bottom line. Let's get efficient. Let's retain our customers. Let's treat them fairly and so on and get this pricing squared up.

Q You mentioned other information you took home, interview questions, job descriptions, that sort of stuff. What time frame was that?

A That was during that period of time. Really the whole time I was employed by Burbank.

Q Was this an ongoing thing for you or was this something you said you needed to do one day on this day I'm going take home a bunch of stuff to work on it?

A I would say some of it was ongoing. There's no definitive. When Anamax in Green Bay or Tim Guzek

A I think it was to do with the routes. If there was a trap route that would pick up certain stores or just basic trap route, I came up with a spreadsheet format to say if a truck went out and picked up like 13 stores -- what the driver would do is he would actually go to one store and suck out the grease trap and then go on to the next store and he would drain that grease trap back down the sewer, which is illegal by any means, and then he would proceed on to another store. In other words, one small truck that would have about 4,000 gallons capacity would pump 13 grease traps in a day. The only way they could do that is they're moving the waste around the city and dumping it back in the manhole.

One measure of efficiency was to see how many -- the more traps a guy could do in the least amount -- Burbank didn't want the waste because it's a big cost to process. They would charge the customer full price for evacuating that trap based on the size and then only bring back a quarter of a load or a partial load of grease. They would just continue to drain all the food waste and waste water back off in the next person's trap. I believe this is still going on today. That's how

they would do that.
So one thing that I would work on is efficiency of that vehicle and which driver was better at it than the next person.
Q. Which driver was better at doing this illegal activity than the next person?
A. Correct.
Q. Did you report this to anybody?
A. They were -- everybody was --
Q. You didn't?
A. Did I specifically report it to them?
Q. Yes.
A. I told Mike Langenhorst that that was what was occurring.
Q. When did you tell him that?
A. Shortly after they purchased our company.
Q. What did he say?
A. He said they felt that because the -- in their opinion, this is John Meyer, Jr., they felt that since the restaurant is paying waste disposal to the city for disposal of their sewage that really you already paid for that waste anyway so we should be allowed to put it back down the sewer. I think Rick Kurtz, who was plant manager, probably also heard John Meyer, Jr. say that.

Q. I didn't hear the last part.
A. Rick Kurtz, I believe, also heard that. He was the plant manager. Everyone was aware that that was what was going on.
Q. Everyone like city officials?
A. No. Obviously not.
Q. Okay.
A. The Burbank office people were aware of that. Burbank drivers are certainly aware of what they're doing.
Q. How long had that practice been going on?
A. The practice had been going on really -- it was more prevalent after the Anamax purchase. Prior to the Anamax purchase, the Burbank trucks would always come back full from the routes. And then, after the Anamax purchase, the efficiency thing through this impact study to reduce the volume coming back -- so they would just continually drain all the material off down the city sewers.
Q. Who else have you told about this practice?
A. I've told several restaurants which switched to our accounts because of the practice.
Q. And who were those specifically?
A. I believe the Perkins restaurants. I believe the Wendy's restaurants. Several of the grease trap

accounts that we have. We don't have that many.
Q. Do you recall their names?
A. Well, Pat Correl would be the Perkins. Dave Spychalski is the Wendy's manager.
Q. And the trap accounts -- you said there were a few. Do you recall the names of the restaurants that have the traps?
A. Culver's. There's several types of Culver's. Any restaurant that has an outside grease trap, this is what's occurring. That's the way Burbank performed the service and still does as far as I know.
Q. Have you seen any Burbank Grease trucks doing this since you left?
A. I have not followed any Burbank Grease trucks around.
Q. So the answer is no, you haven't seen any trucks doing this?
A. No.
Q. Do you know of anybody else who has seen their trucks doing this?
A. No. Other than the drivers that drive the trucks on a daily basis.
Q. About how many of these trap accounts do you think you mentioned this practice to that you have now

acquired from Burbank?
A. I would say a dozen of the outside accounts. The Wendy's stores -- we service about 37, but most of those traps are inside traps. They don't back drain on the inside traps.
Q. Let me just back up. One of the things you said right before you listed Perkins and Wendy's was you told several restaurants that Burbank was engaged in this practice of dumping the waste at the next stop?
A. Uh-huh.
Q. And you said that several of those then switched to you because Burbank was engaged in that practice, and you listed Perkins and Wendy's.
A. Right. But of the Perkins and Wendy's, they have certain stores that -- they're not all identical. Some have an outside grease trap. Some have an inside. On the inside grease traps, you really can't back drain because it will flood out the restaurant. On the outside grease traps you can.
Q. So is it still your testimony though, Mr. Sokolowski, that one of the reasons Perkins and Wendy's switched to United Grease was because of you communicating to them Burbank's practice of back draining the grease?

A I would say that had a factor in it. I wouldn't say it was totally attributable to that. The other factor was poor service by Burbank Grease.
Q What do you mean by that?
A Problems with them over-servicing or under-servicing the accounts in regards to the trap causing back ups and in regards to the fry grease causing service interruption on their part by having to use five gallon pails to store the grease. Additionally, United Grease uses a different method for collection of the fry grease. Burbank uses only large tractor semi trailers to collect the fry grease. Most of these units will not fit the smaller restaurants or even some of the chain accounts because of the driveway or parking areas. The containers that Burbank puts down have to be set way away from the restaurant to allow the trailer to come in. Our service we can put the container right by the building so the person doesn't have to walk all the way across the parking lot. Several accounts have switched to us because of the placement of the container that Burbank cannot provide.
Q You mentioned that one of the factors in causing some of these restaurants to switch was problems

service, usually I would try to save the account or we would send a sales person to that account to try to save that account so it would become known. Generally when the customer would become really irate, Brian would give the call to me.
Q Nice guy.
A Yes.
Q Earlier on in this case we asked you some written questions and some written requests for documents for you to produce to us information that you had that you had taken from Burbank.
A Uh-huh.
Q Do you recall being asked those questions?
A For the most part, yes.
Q You provided my office through your attorney a computer disk or two, I don't remember how many there were, –
A Right.
Q – with some information. Here are the disks.
A Okay.
Q And in your written statements I'll represent to you you said you destroyed other items, correct?
A Correct.
Q What did you destroy?
A I destroyed the grease trap listing that I had.

with over- or under-service, correct?
A Correct.
Q How would a restaurant communicate such a problem to Burbank?
A They would call and say the grease is overflowing, please come back it up. It was usually over the phone how they would communicate that.
Q Who would get that call?
A Brian Lodding would get that call or one of the office receptionists would take that call.
Q How was that handled?
A A ticket was made to have that request routed to a specific route so the next time a truck would be coming through the area, the driver would have a work ticket to service that account.
Q As part of your duty as territory manager, did you have oversight to make sure these complaints were solved?
A Somewhat. A lot of them I didn't ever find out because Brian took care of that area. It wasn't good for him to be telling me that he had 40,000 complaints. He kind of kept that to himself.
Q How did you learn that these people then had bad service?
A Because when they would want to discontinue our

And the other items you have copies of, I gave that to my attorney.
Q Other than the grease trap listing – and that's the one we talked about earlier, correct?
A Uh-huh.
Q Yes?
A Yes. The grease trap listing we're talking about.
Q The one we talked about before we took our little break today?
A Yes.
Q Other than that, did you destroy any other documents?
A It would have been on the computer disk. They're not really destroyed. He has the disk. They're deleted off our computer system.
Q And when you say our computer system, you mean the one at United?
A The one at United Grease.
Q So at one point these items were on the computer system at United?
A No. Maybe a document or two would have been on the computer system.
Q What would have been on there?
A A job description, interview questions and that sort of thing.

Q During the last month of your employment, -- back up. During March of 2001 and April 2001, did you remove any information from Burbank whether it be on a hard copy paper format or on a computer disk for the purpose of taking it with you to a new job?
A No. The information I had was, like I say, the trap listing which was old and that I had previously had. The other documents were the computer disks. Whether it was within the last month -- if anything was updated or changed on those things. It wasn't for the purpose of taking it to the new company. We didn't even have a computer system at the office at the time.
Q When you say the trap listing was old, how old was it?
A It was from December of 2000 I believe.
Q And how often does that trap listing --
A It changes daily.
Q That was my question. How often does it change?
A Yes. It changes all the time as they update their pricing, and there's new restaurants every day that open up. There's people that go out of business every day, that sort of thing.
Q When you went to work at United Liquid Waste, what

Q Can you identify any sites that you remember looking on to get these jobs?
A There's a site we subscribe to. It's called Onvia. It's just a publication that comes across. It lists all the jobs in whatever states you want to apply for. The Western Builder. Then there are several municipal sites you can actually go to. There's a municipal waste water site where you can go to that will list solicitation to work. That's probably one of the main sites.
Q Do you recall the name of it?
A It's www.OC.
Q And you said you accessed this information from your home?
A Yes. I'm a member of the Waste Water Operator's Association. That's really what that is. That site there will list digester cleanouts, lagoon cleanouts, lime sludge cleanouts and things like that.
Q Before United Grease was formed, did United Liquid Waste attempt to acquire trap or fry grease accounts?
A That's a good question.
Q Thanks.
A I think they always had some grease traps. It

did you do there?
A I did sales.
Q We talked earlier about targeting large municipal waste water plants and large food corporations that required waste disposal as some of the ideas you had in going to United Liquid Waste.
A Yes.
Q Did you do that when you got there?
A Yes.
Q Whom did you target?
A We targeted municipal waste water plants because United Liquid Waste is really set up to deal with that material.
Q Did you target any other types of businesses when you went there?
A Specifically target? That would be the main -- food plants, large food plants -- we would try to do some of those. A lot of the work was bid jobs so jobs that were published either in like a Western Builder type magazine or over the Internet for lowest bid gets the job providing you meet qualifications. I did a lot of work on bidding on jobs.
Q Where did you access the Internet?
A I accessed the Internet from my house.

certainly wasn't the target of the business at all. They may have had just a small -- I'm guessing less than ten grease traps or something that they pumped.
Q And when you got there, did you go about trying to acquire other traps?
A Yes, I did.
Q How did you do that?
A I did it by calling people that I knew had grease traps, and then I went by going to the restaurants to acquire more grease traps. However, we could not process any fry grease at the time or anything like that, so we couldn't do the fry grease at all. Most restaurants wanted to do the grease trap pumping with the fry grease otherwise they wouldn't switch to the service. The only company around in our area was Burbank Grease doing the fry grease because they had bought out National Byproducts and Darling from the area. So they had basically a monopoly on the service area. There was no one else to compete with them.
Q When you said you started to call people that you knew, --
A Uh-huh.
Q How did you -- is it people you knew from memory?

A Friends that own restaurants.
Q Did you acquire any of those accounts?
A Yeah.
Q Were any of those non-Burbank accounts?
A I don't know.
Q You also said you started going to restaurants; is that correct?
A Yes.
Q How did you decide which restaurants to go to?
A If I would go out to eat, I would ask to see the manager and ask them if he would be interested in switching his service.
Q Did you eat out a lot or how did you go about --
A Every time I would go out to eat, I would certainly do that. I would ask.
Q Are we talking breakfast, lunch, dinner? How often would you go out?
A Once a day.
Q Did you and anybody else at United Liquid Waste sit down and develop any sort of strategy or business plan or anything to go out and acquire --
A No.
Q -- trap or fry grease accounts?
A No.
Q At any time did you do that?

Q Other than yourself, was there anyone else at United Liquid Waste or employed by United Liquid Waste who went about soliciting either fry grease, grease trap or industrial accounts before United Grease was formed?
A Dave Reinbold is employed by United Liquid Waste, and he may have solicited some grease trap accounts. Prior to the formation of United Grease I don't know.
Q For whom was he soliciting those accounts, United Liquid Waste?
A You know what, I don't think he was employed then. I guess I don't know --
Q Okay.
A -- on that. I don't think he was employed.
Q We're going to get to Dave anyway.
A Okay.
Q Other than Mr. Reinbold, who may or may not have been employed by United Liquid Waste at that time, was there anybody else on the behalf of United Liquid Waste soliciting trap, fry grease or industrial accounts after you started working for them and before United Grease was formed?
A Not that I'm aware of.
Q Any of the Tracey guys do any soliciting?

A No.
Q As you sit here today, you still have no business plans or designs to go acquire any more accounts?
A No. That's why we only have 200 accounts.
Q You have --
A 238 accounts total.
Q How many of those are non-Burbank accounts, accounts you didn't get from Burbank?
A I'm guessing probably 15, 20. Maybe more. I guess you're in two areas. You're talking about grease trap and then you're talking about fry grease. There's going to be some distinction there. The fry grease accounts that we got that were non-Burbank -- I would say almost all of them were Burbank with the exception of new stores and closings and things like that. The fry grease --
MR. EISENBERG: You just said fry grease.
A Excuse me. The trap grease there's probably 60 or 70 stores that were non-Burbank accounts.
Q And just so I'm clear, the 238 accounts --
A That's total grease trap and fry grease. There's I think 150 -- I think there's 157 grease trap accounts that we service, and the balance is fry grease traps.

A They didn't do sales.
Q You testified earlier that you had this agreement with the Tracey brothers and Bob's father to start a business someday if you hit a certain amount of sales, correct?
A Right.
Q When did that happen?
A When did I reach that amount?
Q Yes.
A It was probably just before we formed United Grease. I think it was just right about that time.
Q Why was United Grease formed then?
A It just was an idea that came to my mind to start a competitive company with Burbank because they really had no competition because they bought out all of their competitors.
Q Did you discuss that then with the Traceys?
A Yes.
Q When did those discussions take place in the picture here?
A Probably two weeks before we formed the company.
Q Did you decide how you were going to market that company?
A No.

Q You knew you were going to be competitive with Burbank though, correct?
A Not necessarily at the time.
Q Well, who else were you going to be competitive with?
A Businesses change. We all thought the business would go this way, and it ended up taking a total turn to generate money. With a start-up business, you do whatever you can to try and keep from going bankrupt.
Q Where did you think it was going to go first?
A I did not really know. I guess what I was more interested in was being part equity owner of a company. I had been involved in companies in the past where we changed names and so on as the business philosophy or business market changed. I thought we would form the company and just see where it would take us.
Q So who was going to work for United Grease when it first started?
A We had no employees. Just myself. We figured that if we were doing liquid waste, then the grease company would pay United Liquid Waste to pick up that material and use their equipment.
Q At the time United Liquid Waste was doing liquid

a Culver's restaurant in town, a new Culver's that were opening up.
Q How did you get that one?
A I went into the restaurant, ate, talked to the manager. They liked me, and they were having service issues with Burbank. At the time they wanted us to do the fry grease as well as the grease trap. They had two stores. They said that they would switch. I said that just starting out I can't be competitive and I'll have to charge you probably more than what they're charging. They agreed to that. They paid probably $300, I think, for their grease containers which I had to order. I did not have any -- the first thing we did was pump their grease trap for them because it was all full of grease because it hadn't been serviced properly. One store was brand new, and that was just going in. That's how I started.
Q Let me ask you this, Mr. Sokolowski. You testified that United Grease started with no clients.
A Correct.
Q You had no marketing plan as to how you were going to get new clients?
A Absolutely.

waste, correct?
A Correct.
Q Why on earth would they now allow you to do liquid waste as United Liquid Waste?
A Because that was our original agreement; that after I got them so many dollars of revenue, they would allow me to be an equity owner of the company.
Q Including one that was in essence taking their market?
A Yes.
Q How many accounts had you solicited for United Liquid Waste by the time you formed United Liquid Grease?
A It was mainly all large account, large projects, lagoon cleanout, dredging ponds, municipal sledge hauling. I would probably say 100.
Q And then once United Grease was formed, did it take over the management then of those accounts?
A No. All the former accounts that were United's are still United's accounts, United Liquid Waste accounts. When Grease started, it started with no accounts.
Q So what's the first account United Grease got?
A I think -- that's a good one. I would say it was

Q And you didn't get any clients from United Liquid Waste?
A Correct.
Q One day you walked into a Culver's and it hit you, I should try to solicit this for United Liquid Grease. Is that what I'm supposed to believe?
MR. EISENBERG: We don't really care what you believe. That's his testimony.
A That's how it happened.
Q Okay. And that's the marketing strategy that you have engaged in for United Grease; going into different restaurants, eating and then asking for their business?
A Uh-huh.
Q Is that yes?
A Yes.
MR. EISENBERG: He's only got 200 restaurants. Factually it fits.
Q How much weight have you gained since you started? Just kidding. How did you decide where to go eat?
A To be honest with you, if I would be driving down a road and I would see a large -- the larger the restaurant I thought the bigger the grease trap and the more grease that they would have, so that would be the target.

Q Did you divide up any territories? It makes sense that you would acquire them in a certain area.
A United Grease didn't have a truck, so I had to use whatever United Liquid Waste had available. They didn't have too much available equipment. Everything was being used because they were really busy doing municipal sludge. We had to be very picky about who we could service and where the account kind of was otherwise we couldn't service them.
Q So how did you decide where to go?
A Like I mentioned, we would try and do accounts closer to the Watertown area if we could so we could maybe do two or three stops in a day.
Q Other than the Watertown area, did you market anywhere else?
A We tried certain areas. I guess to move forward a little bit, what we did was I thought the only way to sell any quantity we're going to have to buy a truck. So we ordered a truck and then really didn't start to sell -- we didn't take delivery on that truck until I think August of 2002. So we really couldn't do any sales at all until at that point. So what we decided was we would start to talk to the large chain restaurants to see if we

got the account for $2 less per stop than what Burbank was charging. I think I charged them more per trap for picking up. I said, "We're just starting out and after we get going, I can probably lower your rates." He was a supporter and went with us.
Q What information did you have about the Wendy's Bridgeman Foods group before you went there on behalf of United?
A I knew the person. I knew the owners of that. They had a lot of service issues. Burbank had these inside storage tanks at the restaurants, and they were a nightmare for them. They never worked. Burbank was never able to provide maintenance people to come out and fix all of the stuff so they had grease all over in the restaurants. They were getting pretty irate with them. When I was just getting ready to leave Burbank, Burbank decided to remove those tanks and try and keep the account by putting out the outside dumpsters which they did. But they also charged Wendy's for them, for the dumpsters, plus initially I think they charged them for the inside units. The guys at Wendy's were really thinking that they were getting railroaded here, and they

could land a Wendy's or land a Perkins or something where they had 100 stores or something. Then that would get your foot in the door. You would have to service the accounts because they were spread out, but then, once you did that, you could start to build a route and have an area where you go into a whole town and do the whole town with a truck. The only two large ones -- I guess we got the Wendy's account, Bridgeman Foods, and they're located pretty much in southern Wisconsin. That was our first big account. It was 37 stores, I think.
Q That was a Burbank account before you got it, correct?
A Correct.
Q Were you at all responsible as territory manager or as director of operations for setting the pricing or any other information related to those accounts for Burbank?
A No. They were already in place. The pricing was in the groups like I mentioned.
Q Okay.
A So I went to Wendy's and I knew the manager and I asked him if he would consider switching. He said sure because he was tired of service issues. So I

had no place else to turn because there was no other competitors. So when I came along and said that I would do it for pretty much the same rate, they were like okay, Larry, take care of us.
Q Did you know the rate they were being charged before you went there?
A Yes. The standard chain rate was $30 for the fry grease pick up and the grease traps were about 12 cents a gallon.
Q At this time did you have any other accounts where you were doing the fry grease pick up?
A Very minimal. Some of the Culver's and a couple mom and pops and some friends.
Q On what basis did you decide to charge them $2 less per stop?
A I believe Dave said, "Larry, you got to at least save me something so I can talk to Junior Bridgeman and tell him I got a better deal." So I said, "I'll do it for $2 less. I'll give you brand new grease tanks." The grease tanks cost almost $300 a piece, so he said okay.
Q At that time did you know what your costs were going to be to service the Wendy's accounts?
A No.
Q We jumped ahead from this first Culver's. You

said at some point we decided to buy a truck and get into the market.
A Uh-huh.
Q How did you make that decision?
A Well, Bob's trucks or United Liquid Waste's trucks were busy. We didn't have the equipment available to service the account, so we have had to have something. If we were ever going to try to make the business move forward, we had to decide to buy a truck so you can do some pick ups.
Q Did United Grease have money on hand to buy a truck?
A United Grease, basically myself and partners, put in equal shares of money to do the purchases. It was borrowed money.
Q Borrowed from the members?
A From the members and from the bank.
Q And at the time you got that first Culver's account, how did you go about picking up the grease or cleaning the trap?
A We couldn't pick up the grease yet because we didn't process grease or anything. We just sent one of the liquid waste trucks over there to pump out the grease trap.
Q Did you work out a compensation scheme with liquid

Q To whom did those Culver's stores initially write their checks?
A United Grease.
Q Did you share employees with United Liquid Waste, office staff or other employees?
A Yes. In the office there was a receptionist/bookkeeper, whatever, and we would share her time and we didn't -- there wasn't -- it wasn't very time consuming. We didn't have too many accounts.
Q What did you do all day?
A I would do work for United Liquid Waste still doing sales for them and work on large industrial projects and then spent some time during the day doing sales for grease.
Q At some point there was a gentleman named Dave Reinbold?
A Yes.
Q And he did some sales for United Grease as well?
A Right. He was hired by United Liquid Waste to cover more or less like Chicago area, southern area, for doing large food plants and municipal sludge as well. Kind of in his spare time he would do some grease trap and grease sales.
Q What territory?

waste on that?
A Yes. I believe so. I don't recall what it was. We paid them back for the hourly rate for the truck. I think it's 5 cents a gallon for disposal of the grease trap waste.
Q Whose employees drove the truck?
A United Liquid Waste.
Q Where was the grease disposed?
A At the United Liquid Waste facility.
Q And at that time United Greases offices were at United Liquid Waste's facility?
A Correct.
Q And they still are?
A Yes.
Q Who did the invoicing for United Grease at that time?
A I believe I did.
Q How did you do that?
A We just wrote them out a pick up ticket and sent them a bill for whatever it was, $30 for the -- for the grease trap I think it was a little bit more than that.
Q Did you use the computers at United Liquid Waste for that?
A I think so.

A Wherever he would be that we could service. I'll clarify that.
Q And when you say in his spare time he would make those calls, would that be while he was on sales calls for United Liquid Waste?
A Yes.
Q Who paid his salary or his wages?
A United Liquid Waste.
Q Did United Grease reimburse him at all for any services that he provided to United Grease?
A Yes.
Q How did you determine how to do that?
A Pretty vague. I think what we decided was the revenue generated from the grease stops that Dave would get, 5 percent of the total revenue would go to United Liquid Waste to compensate Dave's time and so on and get the account.
Q Over what period of time has Dave Reinbold solicited accounts for United Grease?
A I don't know the exact date. I'm saying January 2003 to present. Maybe a few months before that. The end of 2002, towards latter 2002.
Q You provide Dave Reinbold any direction in soliciting grease or trap accounts?

A Direction as to –
Q How to do it.
A How to do it? I went out with Dave for a day to, you know, show him what a grease trap was, show him what the fry grease containers look like and how to explain to the customer what our service was and how to charge the customer. Basically the charging was whatever we could get.
Q How did you decide where to take Dave to go do this?
A I took him nearby. I think we actually came to Madison.
Q How did you –
A Someplace where there were some chain accounts versus some mom and pop places.
Q How did you pick where you stopped with him?
A We just at random. Initially I made Dave up a list of restaurants so we could not be backtracking. In other words, he would go to a restaurant and we would have – I would go on the Internet, print off a list of the Madison restaurants, and then he could check off which places he stopped at so we knew what happened to the account or if we need to call on them again or is it that we're not going to get the account. I

don't know if Dave knew certain restaurants, if he knew what the pricing was.
Q Had Dave ever done restaurant or trap or fry grease in the past?
A I don't know. I don't believe so.
Q That's why you took him out, right?
A But Dave had been involved in sales for a long time. I don't know whether or not he ever sold a grease trap in his former business or not.
Q Did you ever give him information as to what a restaurant was being charged or what a restaurant was probably being charged for services?
A I gave him information to the best of my knowledge what the restaurant was being charged. That was from the knowledge that I had gained at Burbank. It was either 12 cents a gallon for an outside trap if it was a chain, 16 cents a gallon, $125 for an inside trap. It was all very standard. The only deviation would be like if a guy had a little grease trap down in his basement and you had to bring 300 feet of hose along. Then you would charge him an extra $10 or $15 for the driver's work to carry the hose down there. Other than that, there was really no deviation from that.

gave him a list of ones to do as we got into it a little bit. He never really spent a lot of time doing it.
Q Did you keep a list of places that you stopped?
A I did initially, but then we got more involved doing the industrial stuff. We really haven't solicited the restaurant end of it too much.
Q Where is that list today?
A I couldn't tell you.
Q Did you keep it in paper form or on a computer?
A It would be paper.
Q When you compiled a list, did you do it at the time as you were stopping somewhere or did you have a list ahead of time to decide where you were going to stop?
A I tried to have a list ahead of time, but it would be like in alphabetical order. So then we could just – if you pulled into Buddy's Restaurant, you could just check off you were at Buddy's Restaurant or write down underneath the name what you had and what the guy said.
Q Did Dave Reinbold ever walk into a restaurant to solicit its business knowing what that restaurant was paying for its services elsewhere?
A No. He did not know what the pricing was. I

Q Was information about prices being charged to Burbank customers ever entered into a computer at United Liquid Waste?
A Yes.
Q Who did that?
A Deborah Bohlman and myself.
Q Where did you get that information?
A I got it from the Burbank grease trap listing.
Q What other information was entered into the computer system in addition to the price that was being charged?
A Name of the restaurant, phone number, the address, approximate or guesstimated size of the grease trap and guesstimated pricing.
Q Why did you enter all of that information into the United Liquid Waste computer?
A So we could print out a listing and potentially give it to a sales person or myself and then basically make a route or where you can go to do sales calls.
Q Did you or somebody else actually use that information to solicit business for United Grease?
A I used it, and I would say – I don't know if Dave used that or not. He may have used it just for a short period or a couple stops or something.

Q Was the frequency of service listed?
A No. Not that I recall. A lot of frequencies that Burbank was doing were -- it's so subjective because if a restaurant uses -- during the summer it may have to be a done more because it's all proportional to their output of food.
Q So you're saying that if the frequency was listed on there anyway, it was irrelevant?
A Yes.
Q If you went to a restaurant knowing their frequency, would that give you any advantage to someone off the street who didn't?
A No.
Q Why not?
A Because the frequency is always adjusted based on, like I said, the usage. So it wouldn't do me any good to go to the restaurant and say I'll pump it three times a year and the restaurant owners might say it's being pumped six times a year. I would say you probably have a lot of grease or they're over-servicing their account. I would say one of our services is our technician determines how much grease is in the trap and if it needs to be serviced more or less so you avoid sewer back ups and so on.

account. They don't care about the price.
Q You're saying if you go ask somebody what they're price is, --
A They will tell you.
Q -- they will tell you?
A Sure.
Q What's their incentive to do that?
A It's like if you go buy a car and the dealer says I'll sell this to you for $7,000 and you go to the other dealer and say this guy is going to do it for $7,000, would you do it for $6,500. If the guy wants to make the sale, he'll drop his price. I'll try to do value-added service. I tell you what I will do. We'll power wash the area down. We'll wash the grease container every time for you. We'll call ahead to let he know when we're coming. Isn't that worth another $5 or $10 to you? The guy will say sure. Every store is unique and every one's different. When you deal with the chain accounts, they like to see standardized providing. When you go and do the mom and pops, it's all over the place pricing. We were able to go and charge these customers what I thought was really big money for these grease containers when they had one that's just like

Q If you knew the price that a customer was being charged per pick up, --
A Okay.
Q -- wouldn't that give you an advantage over someone who walked into that store and didn't know that price?
A No.
Q Why not?
A Because the owner is going to say you beat the price or if -- there's three different factors involved. One, if the guy is unhappy with his service, he's not going to care if he pays $10 more for a pick up. He's going to switch. Number two, if they're having problems with their equipment which maybe comes back to their servicing but they got the wrong type of container, the wrong placement of the container, all those items, he doesn't care if it's going to cost $30 more to pick it up. He'll switch. Finally, the last thing is probably price. If you ask them, they will tell you what the price is. If it's $30 a pick up, it's common knowledge. They will tell you what it is and can you beat that as evidenced by me getting the Wendy's stores for $2 less a pick up less. It's servicing the

theirs sitting there. Theirs was dirty. They said sure, switch it out. It's an eyesore. It's a mess. They would pay us -- it's $200 or $300 for the container.
Q So you're telling me that at the time you go solicit these accounts, if you knew the price it didn't give you any competitive advantage?
A None.
Q Did knowing the price give you any advantage in deciding which accounts to go solicit?
A There, again, I would say that's more area specific because we didn't have -- we still don't have the equipment to go that far. We have got one truck. I can't go from Illinois to the top of Wisconsin for an extra whatever. I don't think it helps.
Q If you bought more trucks, you could do that, correct?
A Not on 200 grease stops.
Q If you knew the prices that they were being charged for their current service, you could estimate what it would cost you to go get these accounts, correct?
A Somewhat. But it's hard to compete with Burbank because they're illegally dumping all of their

waste material.
Q And you know that for a fact?
A Yes, I do.
Q What other information have you used at United Grease that you took from Burbank?
A I used the industrial spreadsheet that I developed to kind of estimate maybe the amount of tonnage that a company may produce.
Q Tell me about that. You developed a spreadsheet?
A Uh-huh.
Q Is that a yes?
A Yes.
Q What information was contained on that?
A Well, every industrial account that we had.
Q At Burbank?
A Burbank was typically using Burbank as a contract -- maybe not a contract but a processor of their waist oil. So what the spreadsheet did -- it just was a simple calculation of how many pounds of oil were collected at the site times what the market rate was less a processing fee gave them what Burbank would get paid back or not Burbank, what the customer would be paid for the material.
Q Basically a pricing formula?

Q So you had all of this information in your head?
A Yes.
Q About what the specific numbers were for Burbank's accounts?
A Yes.
Q So then why did you take the document if you had it in your head?
A Error in judgment. I should have left that stuff sit on my desk that day. I think I had it at home, and I just forgot about it. I had that and that trap list, and I just plain forgot about that stuff.
Q And then when did you discover it?
A I discovered it probably after I was digging through the closet and came up with it. That was after we had formed the grease company.
Q You decided as long as you have it, you might as well use it?
MR. EISENBERG: He's still trying to finish his answer.
A I'm losing my train of thought.
Q You said after you formed the grease company, you discovered that you had this information?
A Uh-huh.
Q Is that correct?

A Yes. It's standard throughout the industry. Everybody uses the same type of system.
Q The same basic information, correct?
A Right.
Q Does everybody in the industry have the same processing costs?
A I wouldn't know.
Q Does everybody in the industry get the same yield out of the grease they process?
A I wouldn't know.
Q Does everybody in the industry have the capacity to process the same amount of tonnage or the same amount of volume?
A I don't know.
Q You knew what Burbank's were, correct?
A I knew pretty much what they could process, correct.
Q Based on the information you had on the spreadsheets that you took from Burbank, correct?
A Based on past experience from my entire employment at Burbank. I was the one that really handled these accounts on a personal basis, so I knew when the plants were changing production, which they did all the time, and knew when the markets would go up or down for the grease and so on like that.

A Yes.
Q And it was of no value because you didn't need to know price, you didn't need to know frequency and you had all of these numbers in your head, correct?
A Yes.
Q Yet you took it to United Grease and used it, correct?
A Correct.
Q If you had it in your head and it was of no value, why did you use it?
A Error in judgment. It didn't do me any good. I can tell you -- I can name you every account and tell you how many loads -- I'm sure it's all changed today because they change. I can tell you how many loads a day they had, what their pricing was. They only had six or so active industrial accounts. The rest were small. The pricing structure was pretty much all 4 cents a pound with the exception I think Burke Foods was being charged 3.92 cents a pound. I knew the poundage and how many loads a day they had. It was just straightforward. There's nothing secretive in my eyes about it. It's just a way to bill them.
Q And that's based on your experience at Burbank,

correct?
A And my experience with seeing the other spreadsheets at the other companies that are competitors such as Kaluzney and Mahoney. They use the same thing. As a matter of fact, I developed my stuff based off of some of Kaluzney's reports. The Anamax company actually shared the owners -- the owners shared stuff with us on how their formulas and stuff worked. I'm getting off here.
Q I'm interested in what you said. The Anamax company --
A Also had formulas before they bought Burbank on a very similar thing on how they did their grease customers and how they did their rendering processing.
Q So is it your testimony, Mr. Sokolowski, that Kaluzney Brothers knows Burbank's processing costs?
A I would say they could come very close because they're in the same business and run a very similar style plant.
Q So they can come close?
A They can't tell you exactly if that's what you're looking for.

to do.
Q I could do all of that, correct?
A Yes. Every single one.
Q Did you bid on any industrial accounts that were Burbank's on behalf of United Grease or United Liquid Waste?
A Did I bid on them?
Q Did you try to get their work?
A Sure.
Q Which ones?
A I tried to do Burke Marketing or Burke Corporation. We got that account. Hormel Foods in Beloit. We did not get that account. McCain Foods in Fort Atkinson. We did not get that account. McCain Foods in Plover. We did not get that account. There's one kind of an iffy one, Jones Dairy Farm in Fort Atkinson. We do some of their material. They always sell it to whoever is going to pay them the most for it. Burbank never got all of that stuff anyway. Anybody else that we tried? That's about all I can recall, I think, that we solicited.
Q Out of the ones that you listed, Burke, Hormel, McCain -- I won't count Jones Dairy for the time being.

Q That's what I'm looking for, but you, because you had the spreadsheet, could tell us exactly, correct?
A Not because I had the spreadsheet. Because I knew the information. It wasn't their processing costs. It was their charge. I did not have what the cost was to do the product. I had what the charge was.
Q Well, why don't we take a look at what you had, and you can tell me why or why it wasn't relevant.
A Okay.
Q If I wanted to start up a business to compete with United and Burbank, where could I find the information contained in the spreadsheets related to the industrial accounts that you created to know what Burbank's customers' numbers were?
A You could just go simply to the company and ask them. You go to the company, the food processor that's producing the material, and say I would like to bid on processing your material. He'll say great. Here is how many -- you got to know how many pounds it is. They will give you that information. Here is how many pounds we produce per week and here is the oil yields. Here is what we want you to process. Tell us what you're going

A Yes.
Q Out of those, did you do all of the soliciting of those accounts or did somebody else?
A Yes, I did.
Q When you went to those accounts to solicit their business, did you go in and ask that person all of those questions or did you go --
A I went in there and asked them what they had. They were very helpful because they want to try and save the money. They will give you all the information and say give us a better bid. If we can switch and you guys can guarantee us that we're not going to have service issues, any of those problems -- they will switch if you can give them a better rate.
Q Whom did you talk to at Burke?
A Burke I talked to Tom Burke.
Q Whom did you talk to at Hormel?
A I talked to Stuart Hamilton who runs the -- purchasing manager for the plant. Then he referred me to a gentleman in Austin, Minnesota. I think his name was Don. I can't recall. Don something. I only dealt with him a little bit. I mainly dealt with Stuart Hamilton right at the facility.

Q Do you have records at United Grease about any of the conversations that you had with these gentlemen or any of the bids that you put together?
A I may have.
Q The information that was given to you, was it given to you in paper form, over Email or fax somehow?
A Generally over the phone.
Q Did you make --
A I would just jot it down and then make him out a proposal and send it back to them.
Q At McCain Foods whom did you talk to?
A Which plant?
Q Fort Atkinson.
A Well, Bruce Bertelsen is the plant manager. They had a gentleman named Frank Kirby who just runs the waste area. He went to school with my wife. I couldn't get him to switch. They haven't had any problems with Burbank, so they're going to stay there.
Q How about at McCain in Plover? Who did you talk to?
A That's run by an management company, OMI. I think it was Dale Johnson.

down or over. Whatever Burbank is paying them back is just less their processing fee. That's always fluctuating all over the place.
Q So you're telling me that it didn't matter what Burbank was paying. You figured out your bid based on --
A It all comes down to processing costs and transportation costs. Whoever has got the lowest processing and transportation costs should get the work.
Q And did you know what Burbank's processing and transportation costs were when you gave bids to those companies?
A Sure. I talked with these guys probably once a week, every one of them.
Q You're telling me that they gave you Burbank's processing and transportation costs?
A No. I already knew that from when I worked at Burbank.
Q From when you worked at Burbank?
A Correct.
Q And you're telling me that knowing that information, because that, as you just explained, was one of the ways to do the pricing -- knowing what Burbank's costs were didn't give you an

Q Is it your testimony today that these people gave you information over the phone that you wrote down? Do you recall anybody specifically giving you pieces of paper containing numbers?
A Most of it was on the phone. I would say how many loads a week are you doing, what are the yields and all of that. I would say I'll get back to you in a few days. I would compile and see what I could do with it and send it back. I would either call them back with it or I would send them something back. They would say give us a week to think about it. Sometimes I could get them to switch, and sometimes I couldn't.
Q The only one that you mentioned that you did get was Burke, correct?
A Correct.
Q You would agree that knowing the price that Burbank was paying helped you to make a bid to these accounts, correct?
A Not at all.
Q It did not?
A No. Because the price Burbank was paying was what the market was for the commodity product after it was processed. All the material is being sold on the commodity market. It's always going up or

advantage?
A No.
Q You weren't able to undercut the price?
A Bear in mind, I didn't have the equipment. I didn't have any semis. I didn't have any of that stuff.
Q What were you doing out bidding on these jobs?
A I was trying to see if I could get the work reasonable enough where we could afford -- probably the reason I didn't get it is because I didn't have five semis sitting on the lot. We didn't even have a grease processing plant. The only way I could compete was taking the material directly and disposing of it which was 5 cents a gallon which is probably 30 cents a gallon cheaper than what Burbank charged for them to process it. So we could take this material, actually bring it in and dispose of it for less cost and pay these guys back money than what the processing cost was that Burbank was charging.
Q Yet, you still couldn't get the work?
A I got Burke.
MR. EISENBERG: If he couldn't get the work, how come we're here?
MR. HERMES: Because he got some of

work.

MR. EISENBERG: Can we stop for one second?

(Discussion off the record)

(Recess)

Q Mr. Sokolowski, before we took our break, we were talking about information that you had at your disposal regarding Burbank's industrial accounts.

A Uh-huh.

Q And it was your testimony shortly before we took the break that the customers that you attempted to solicit for United knew certain relevant information that you would need in order to give them a competitive bid, correct?

A Yes.

Q And we talked about costs of processing and what they were being paid for their material?

A Uh-huh.

Q Did the customers know their yield, what their product was yielding in items of saleable grease?

A Because we would send them a sheet back, yes. Either monthly or some daily or some weekly of what their yields were. Especially if they were in a transitional phase of their food process operation.

Usually it was an inclusive sheet saying grease trap pumping, fry grease trap pick up, window washing, floor cleaning, et cetera, et cetera. It listed the pricing in there that they were currently paying. I think that came from like Wisconsin Hospitality Group, which was a real large restaurant -- they have got a lot of the Applebee's stores and I think Adoro (phon) Incorporated might have been another one. I had two or three large chains that sent me that information that I know I still got. They were so spread out, I didn't -- I could give them pricing on stores, you know, maybe cheaper, maybe more on some of them, but we had to do all of them or nothing. That's the way the chains work. Our company couldn't compete. I do have that info. They will readily send that out.

Q How did you know who to contact at Wisconsin Hospitality Group?

A I went on the Internet and did a search for restaurant association or restaurant groups. Those will come up. There's a real large restaurant association that most restaurants belong to, and they do a publication and probably they do a membership thing. So at the end of the

Q Did any of these accounts that you attempted to solicit ever provide you with a copy of that sheet?

A You know, I think so, but I can't say for sure.

Q Do you know which one you think might have done that?

A I'm thinking Burke did. I think McCain Foods in Fort Atkinson did. There might have been another one.

Q All right. Let's take a look at some documents then and see if we can get this --

MR. EISENBERG: If you're shifting gears, let's go off the record.

(Discussion off the record)

MR. HERMES: We'll go back on the record.

A Regarding the last question, can I add something to that?

Q Sure.

A Regarding the fry grease and trap account, the chain restaurants would actually send me a list of their stops, Pizza Hut, Applebee's and so on. It would list all of their restaurants. It would list the charges for each service at the restaurants and allow us to bid on these services.

year a couple times a year they will do a publication that will print off every restaurant that belongs to this association. It's almost everybody except the real small little family restaurant or something that belongs to it. They have thousands and thousands of members.

Q Did you actually go on the Internet and do this search?

A Yes.

Q When did you do that?

A At various times.

Q Tell me when you remember.

A I don't remember, but I've done the search.

Q Did you print out information?

A I believe so.

Q Well, if you didn't print it out, how did you know who to solicit?

A I would pick one or two of the big names and then go pick up the phone and call them, talk to the manager. Then the guy would fax me over a sheet and list his 60 restaurants and say here is what we're at and can you beat this pricing.

Q You believe you got that information conveyed to you by the restaurants?

A Oh, yes.

Q Do you still have copies of the information --
A I have got some.
Q -- as it was conveyed to you?
A Yes.
Q Let's jump then to some documents, Mr. Sokolowski. I'll hand you what's been marked as Exhibit 7 and Exhibit 8. I'll represent to you, Mr. Sokolowski, that the computer disks, the two of those in this envelope --
A Yes.
Q That came from your attorney's office?
A Okay. That looks like it.
Q I had printed off titles of all the documents on those disks, and they are represented in Exhibits 7 and 8. Take a look at what you see in Exhibit 7 and Exhibit 8 and tell me if you remember is this the complete lists of items that you took? Is this different at all?
A This looks like it.
Q Do you remember anything else that you may have taken that wouldn't show up here aside from the customer list from the GTEP program that we talked about?
A I think this is it. This is everything. This was everything that was inclusive on those two disks,

agreement, I did that at home. Interview questions I probably did at home. I don't know about that tank measure. All that is is a measurement chart for how much grease is in a tank, a grease tank. There's some that I did at home and some at work.
Q At the time you did these at home, you were employed by Burbank, correct?
A That is correct.
Q And you were doing them for Burbank, correct?
A That is correct.
Q I want to talk about a few of these items specifically in a minute. Is there any rhyme or reason to what you had at home? I know we talked earlier --
A Just everything that was on those disks. Rather than try to make copies, it was all on a couple disks.
Q The information on these disks, how much of it or which of it were used at United Grease?
A The payment chart. Possibly some of those interview questions. I really don't know. Maybe some of the subcontractor agreement. I think I wrote that at home. Maybe parts of that were used on some documents that I use now. The accident

right?
Q That's what I instructed someone on my staff to do, print off a list of all the files on these two disks.
A As far as I can tell, this is it.
Q And the only other document that you claim you did have that may not appear on these disks would be a customer list of trap customers only?
A Partial listing of the trap pumping customers, yes.
Q And the items that are contained in Exhibit 7 and 8, those came from a computer at Burbank, correct?
A No. Yes and no. Some are from my home, and some are from Burbank.
Q Is there a way to tell which ones were which?
A I don't know. I would transfer a lot of times the document back and forth between the two programs and update it or something like that.
Q The ones that you have on these disks that came from your home, they originally came from Burbank, correct?
A No. A lot of stuff I did at home and I would take it to Burbank. It was both ways. Like these interview questions, the job descriptions -- a lot of this stuff I did all at home. Subcontractor

register was just a spreadsheet that had like a name, date, time of accident sheet that the drivers would carry. I may have printed that off to keep track of any accidents or any vehicle damage.
Q Let me just ask you specifically about that one since you said you may have printed that off.
A Yes.
Q Why would you have printed that one off? Was it because it was easier to do that than to make up your own?
A Yes.
Q What else do you see on there that you might have used at United?
A Possibly Emergency Spill Plan. I don't know. I doubt it. That's about it.
Q Okay.
A Let me look at this last sheet here.
Q Sure. Trap routes by driver.
A That was what I was referring to earlier with the -- I believe where the drivers were being able to drain off the liquid and so on, but I don't believe -- we don't use that for anything. I didn't print it off.
Q Let's talk about that one. We'll get to that one

later.
A Okay.
Q Let's look at some specific documents then out of this list that I actually printed off. I'll hand you what's been marked as Exhibit 9. This says Grease Recycling Contract at the top. Do you see that?
A Yes.
Q This is a contract between Burbank and Bridgeman Foods, correct?
A Yes. It looks that way.
Q Why did you have this contract?
A Because I originally wrote the contract, I believe.
Q When did you write it?
A Back in '98 or so or whatever time. Is there a date on here?
Q I don't know.
A Probably had to be '98.
Q Bridgeman Foods is one of the customers that you acquired since leaving Burbank, correct?
A Yes.
Q Do you know if the pricing that Burbank was charging Bridgeman changed at all from this contract until the time you acquired them?

A It looks like I did.
Q How did you come to create this document?
A We were looking at hiring a driver for our truck. I thought the best way to do that -- it's easier to interview if you have some standard questions.
Q Did you use --
MR. EISENBERG: He's just going over documents here. Thank you.
MS. BAUMGARTNER: Okay.
Q Mr. Sokolowski, we were talking about the contents of Exhibit 11. Did you take questions that you used in Exhibit 11 off of information you got from Burbank?
A This is 11. Yes.
Q And why did you do that?
A Because they were -- a driver's a driver, and our business is similar. It just fit that this would be -- the questions I would want to ask would be very similar to the questions that I would ask any driver that we would hire.
Q And it was easier to take something that Burbank had done or you had done for Burbank, copy their form, than create something new for yourself, correct?
A Correct.

A No. I don't know.
Q Do you know if Bridgeman gave Burbank notice of termination pursuant to this?
A I don't know.
Q Let's look at --
MR. EISENBERG: What number was this?
MR. HERMES: That was nine.
Q Let's start with No. 10.
A Okay.
Q What is Exhibit 10?
A It's interview questions for a job position.
Q Why did you have this at home?
A I was going to basically -- I think I wrote most of these up at home, and, like I said, I had this all on the disk. I carried the disk back and forth to work.
Q Do you know when you wrote this at home?
A Maybe a year or so before I quit. I'm guessing maybe a year and a half.
Q Let's look then at Exhibit 11. Keep Exhibit 10 handy. Tell me what that is.
A That is same thing except it's for United Liquid Waste Recycling.
Q Who created the document for United Liquid Waste Recycling?

Q Let's talk about Exhibit 12. Tell me what that is.
A That's a listing of employees for Burbank Grease.
Q Why did you have that on your computer disk?
A Because I had that on there ever since 7/10/00.
Q Okay.
A This was always updated, so I always would update the disk as we would change employees.
Q Did you keep this list on the computer at Burbank?
A Yes.
Q Then you're telling me you would update your computer at Burbank when you changed employees and you would also update your disk at home?
A Sometimes I would do it the other way around. Sometimes I would update it at home and bring the disk back in and update it at Burbank.
Q Looking at Exhibit 12, can you tell me when the last time was that you updated --
A 7/10/00.
Q If you look at Exhibit 7, which is the floppy disk inventory, where it says Organizational Flowchart, that would be the fourth one down.
A Yes.
Q Last modified 9/27/01. That was after you left Burbank, correct?

A Yes.
Q Do you know why you would have modified this document after you left Burbank?
A No.
Q 9/27 of '01.
A It probably wasn't modified. It was probably just opened up or something.
Q Do you know why you would have opened it after you left?
A Because I was looking to see what was on -- I'm really not sure.
Q You were looking to see what was on them to possibly use it at United Grease?
A I'm not sure. I don't know why I would need that for United Grease.
Q Were you looking to hire anybody?
A No.
Q Would there have been anybody else other than yourself who accessed the files on these disks?
A Could have been either family members at my house or it could have been someone at Burbank possibly like Mary Jo or something. If I asked her to go through and find me some information or something, she might have went and looked for that, looked for something.

Q It consists of a bunch of multipage spreadsheet type reports; is that correct?
A Uh-huh.
Q Is that yes?
A Yes.
Q What information is contained on this first page here of Exhibit 13?
A It's the name of the company, the date on which they're serviced, the oil yield.
MS. BAUMGARTNER: I think you're looking at the second page of the exhibit.
A You want the first page?
Q The first page.
A Sorry about that. It looks like weights and a date from Gardetto's grease trap.
Q Why would you have had this particular information?
A Because we were trying to see how much is drained off versus how much -- I'm not sure. Wait a second. This is grease trap. I think this is actual oil, so that's probably indicated wrong. It looks like grease trap. So every day that they would service the number on this on the date, that's how many pounds of oil that they would pick up.

Q How would Mary Jo have access to this disk in September of '01 if you had already left Burbank?
A I don't know.
Q Okay.
A Sorry.
Q That's all right. Did you ever solicit any of Burbank's employees to come work for you at United?
A I did at one time. Let's see. There was a -- I had several of their employees wanting to leave to come work for me shortly after we started the company. I tell you, I can probably list about six or eight names, but I would probably rather not because of actually fear of reprisal from Anamax to those employees.
Q I didn't ask you who they were yet.
A I would rather not because -- I can certainly list the ones that have contacted me and are looking for work.
Q If we need that, we'll ask you.
A Okay.
Q I'll hand you what's been marked as Exhibit 13.
A Okay.
Q And this is a rather large document.
A Uh-huh.

Q And why would you have this information on your computer?
A Just to track because they had gone from a real high amount of pick ups down to very minimal, I believe, before I was leaving there. This goes back to -- is it only one page?
Q Your disk. Not mine. I don't know.
A I haven't looked at it.
Q Do you recall having this type of information for other customers besides Gardetto's?
A No. In a different format like with the industrial accounts?
Q But in terms of this type of sheet where it shows two columns and indicates dates, do you recall having other type of grease trap information?
A No.
Q Do you know why this particular sheet will stop at June of 1999?
A No idea. I think because we probably switched it over to a spreadsheet.
Q Okay.
A It should probably be on a spreadsheet. We did switch it to a spreadsheet.
Q Do you know who services Gardetto's trap at this time?

A Burbank Grease.
Q Let's look at the next page then on this Exhibit 13.
A Page 1.
Q Page 1.
A Okay.
Q And this is for Burke, correct?
A Correct.
Q What is the information here related to Burke?
A It's their amount of oil that's being recovered after Burbank processes the material and the amount of either a charge or a credit to their account.
Q Other than Burbank, who else would have this information compiled in this format?
A This type of information or this specific information?
Q This specific information.
A No one except Burke.
Q Burke?
A Burke would have it. Sure.
Q How would Burke get it?
A These pages were sent to Burke usually weekly or monthly.
Q Do you know how this document was titled on your

Chart '98?
A I believe I did or Mary Jo Gallagher did. I think I did on my computer.
Q And that would have been on your computer primarily at Burbank or at least while you were working at Burbank?
A Right.
Q When you created those spreadsheets, did you create a new one for each year?
A Not always. We just kept on going and changed the dates so you have one big file that we could always go back and historically look how the company has changed their process, what they have done different. It's real easy rather than trying to find different files.
Q Why would that be important to do, to look back?
A You could see if they changed the process in their plant. The oil yield goes to 27.5 down to 3 percent. You know that something happened there.
Q And that would be valuable information for Burbank to know?
A Not necessarily. Their charges and all of that stuff would remain the same. It's good to know for customer relations.

disks?
A Payment Chart '98, I believe. I'm guessing it was Payment Chart '98. Maybe 2002. Payment chart '98.
Q What was contained in Payment Chart '98?
A You're looking at it.
Q Were there years contained after 1998?
A I think so. Maybe not. Is this all of '98 that you're showing me on this document?
Q I am showing you what I got off your disk. That's why I'm asking the questions.
A So you don't know. Is this just all '98 and ends up –
Q Take your time and look through the document, the rest of Exhibit 13. Tell me what you see.
A It's all '98. This would be just Payment Chart '98.
Q Why did you have a payment chart for the year 1998 on your disk?
A Because it was on the disk and I never erased it.
Q How did it end up on the disk in the first place?
A I copied it from the computer to the disk.
Q To take it home or to take it back to Burbank?
A I don't know.
Q Did you create the spreadsheets titled Payment

Q Would it be good to know from a profitability standpoint?
A I don't know.
Q If I were a competitor of Burbank trying to acquire that information, would it be – trying to acquire that account, would it be good to know?
A No. You're going to give them a process cost. You could go to Burke and they would – like I mentioned before, they would say our average yield, looking here, is 60 percent and the loads come out of here are 48,000 pounds. What are you going to charge us to do it. Any food plant will give you that information if they want to get a quote from you otherwise there's no way to give them a quote.
Q Do you know why you had this information?
A Just because it was on the disk and it was never erased.
Q Did you use it at United?
A No. It's 1998 information. They changed their whole process anyway.
Q Who did?
A Burke.
Q Is there any reason you would have modified this document on January 31 of 2002?

A Maybe to open it, look at it or something to see what it was. I don't know.
Q When did you acquire Burke?
A I think it was probably later in 2002. So maybe end of 2002. I really don't know the exact date. Maybe 2003.
Q Do you know when you started to solicit Burke?
A No. Actually, I can tell you about that though. Originally after I left Burbank -- maybe about I'm guessing six months after I left Burbank, I talked to Tom Burke, and he had some other waste streams I thought our company might be able to deal with. I said, "I would like to get your oil reprocessing business." He said, "Well, you know, I think that might be possible." I said okay. So he said, "What would you charge," and I told him our pricing and he said, "Well, I'll think about it." A period of time went by. He called me up and said one day that Burbank just came and raised their rate. So would you still be doing it for what you told me for and I said sure. At that point he switched and cancelled Burbank's service.
Q And you don't know when that was?
A I don't know offhand. No, I don't. It wasn't that long ago.

and Burke knew what Burke's yields were?
A Unless they gave the numbers to other people. I think there was another company that was called Feed Energy out of Des Moines. They also shared information with Feed Energy in Des Moines too. As a matter of fact, Feed Energy took over half the account from Burbank in its original thing. You can see here the yields used to be 70, 80 percent. What happened was Feed Energy came in there and said that they would pay them more or less a rate than Burbank. So they took away half of the account. Then Burbank only got the real, real poor quality stuff because they charged so much. Feed Energy took the good oil and gave them a better deal.
Q One of the companies we talked about earlier, Kaluzney Brothers, would they be able to handle this kind of account?
A Sure.
Q If they called up Burbank, would Burbank give them the yields for Burke?
A Burbank wouldn't, but Burke would.
Q Did you get permission for Burbank to share the yield information with anybody?
A No. Are there any other sheets you want to look

Q Did you tell Tom Burke that wanted his oil business?
A Because the oil yields were so low on Burke's processing material at the end -- about my time of leaving it was like 15, 10 percent oil. It was all waste. So Burbank was charging them a little under 4 cents a pound to process material. We could actually -- I could take that material and just dispose of it for him for less than half of what they were charging.
Q And you knew that before you went to work to solicit them?
A Yes.
Q And you knew that based on the information you learned while working at Burbank, correct?
A Yes. But their process was changed and has continued to change since I left Burbank. All of these food plants change all the time.
Q Other than Burke, no one else knew what Burke's yields were to your knowledge, correct?
A Well, in the Burbank office Mary Jo would -- anybody doing the billings would know. So Rick in the plant would -- a lot of Burbank employees knew.
Q Other than Burbank employees. Burbank employees

at?
Q I'm looking.
A It's all the same whether it's Burke or Brakebush or whatever. Here is that Gardetto's sheet.
Q The remainder of Exhibit 13, are those all industrial accounts?
A All of these, yes. Well, Phil Higgins was a restaurant grease pick up that I just put them on a spreadsheet so we would have a good way of tracking it. We paid him off of fictitious yield. Burbank ended up buying out Phil Higgins. Let's see what else is in here. They look like pretty much all industrial accounts.
Q Okay.
A There's a distinction between some of the trap accounts that we put on the spreadsheet just to track the material.
Q And why was that put on a spreadsheet?
A On some of the better quality. Because we weren't charging them enough so we could actually track it to see if we really wanted to raise the rate or not. Just an easier way for me to look at it at a glance to see who was doing what.
Q After you left Burbank, did you ever see similar information for the accounts listed in Exhibit 13

for any years subsequent to '98?
A So past '98 you're saying did I see this type of information?
Q Correct.
A For like 2000? Yes.
Q Burbank information?
A Yes. I could look at this information until I left.
Q Maybe I misspoke. After you left Burbank --
A Yes.
Q So in April of 2001, did you see pages like this that you may have had whether on disk or somewhere else that contained information for years after 1998, Burbank information?
A If there was anything, it would have to be under that Payment Chart 2002. Other than that I don't know.
Q My question to you on that is how would a Payment Chart 2002 end up on a disk that was yours after you left Burbank in April of 2001?
A I may have created that or copied that or just changed the name of it and used it for quoting purposes. I really don't know the answer to your question.
Q I'll hand you what's been marked as Exhibit 14.

Q Again, it was used in that format by you because, number one, that's what you were familiar with, correct?
A Yes.
Q And it was easier to use that than recreate some new sheet.
A It was what the customer wanted. They wanted to be able to compare apples to apples. They said make it look like just like the Burbank thing so we can make sure everything is the same. I said I can do that.
Q Let's take a look at Exhibit 15. Can you identify at least the first two pages of Exhibit 15.
A Not really. I have no idea what that is.
Q Do you know why you would have had that on your disk?
A No. Looks like just some sort of part of a spreadsheet for something in a tank.
Q Did Burbank ever keep track of inches or gallons of stuff in a tank for customers?
A No. They just did it for like in the process plant if the grease tank is full or something.
Q Is there any reason you would have needed to have that form?
A Not that I know of. This looks like it might be

A Okay. Yes.
Q Do you believe this would be your Payment Chart 2002?
A Right. This would be -- I probably copied that so I could use similar type of format for giving quotes or whatever or to plug in fictitious numbers to see what costing and so on would be.
Q And you would agree with me, Mr. Sokolowski, that the information contained in Exhibit 14 is arranged in the same format as Exhibit 13 although I was not artful enough to print it the same way?
A Yes.
Q Is that the method that was used by Burbank to track the same information?
A Yes and no. They also used the GTEP system.
Q And this is an Excel spreadsheet?
A Right. The GTEP system is just tied into a lot of other spreadsheets so it can dump information into the financials and things like that.
Q If I could print Exhibit 14 to line up sideways like Exhibit 13 --
A It would be very similar, sure.
Q The difference would be United Grease, LLC versus Burbank, LLC at the top, correct?
A Right.

for outside storage tanks or something. I don't know.
Q Can't think of why you would have had this on your disk?
A No.
Q Does United Grease use any similar form to keep track of --
A No.
Q -- tank gallons or inches?
A No.
Q After the first two pages can you tell me what that is.
A This is what I was talking about before. This is the grease trap material. It's like the size of the gallons of the grease trap, the pounds that they're picking up and basically what the guy did for the route for the day. So if we take one of these examples, maybe Randy C for instance, the size of the grease trap was 100,000 pounds on the traps that he stopped at that day. He only brought back 34,000 pounds. He drained 66 percent of that waste material back to the sewer illegally and to the municipality and charged the customer the full amount as if they had pumped out the trap.

Q Why did you have this information on your disk?
A Because this was how we tracked the process that I explained earlier of how profitable the trucks were or how well the driver was actually discarding all the waste.
Q Is there any place else that somebody could go in the world and get this information as it's contained here?
A I don't know. I think they could go to Anamax or Burbank and get this information.
Q Other than those two organizations, is there anyplace else that anybody could go get this particular information?
A Not that I'm aware of other than maybe the drivers. Well, they would be employees.
Q Yes. There's no magazine or Internet site that would contain this type of information?
A Not for this particular information, no.
Q And how are these items organized in this particular spreadsheet?
A I have no idea. Whatever order the truck would come in it would have at least on abbreviation or something for the stops that the guy did and then how many gallons he should have picked up, how many gallons he put down the sewer and the

on frequency. So a route -- next time the guy wouldn't go do these same stores. He would probably do six or eight different stores. It would still be called that route, like Madison, for instance. In other words -- do you follow me? The restaurant names would always switch around. You get call-ins and all kind of abnormalities with grease traps. You're not going to have a set route where the guy does the same thing all the time.
Q They never had the same route?
A Grease traps would change constantly. The guy might be in the same area, but he would service all different customers.
Q What were the numbers for in front of those customers?
A I think it was a customer number. I really don't know.
Q And how was that relevant? What information did that provide you if you had the customer number at Burbank?
A I don't know. That's something they just put in.
Q Well, it was done in 1998, correct?
A Correct.
Q And you were there?

charge -- you just go across the line for the charges. You end up with revenues for the truck for the day.
Q And this was Burbank revenues per truck per day, correct?
A Well, it's somewhat fictitious because we did not have a cost, a process cost. It was a guesstimated cost. Then the hourly cost for the truck was somewhat estimated too.
Q Who compiled this information?
A I set up the spreadsheets and then had the receptionist put in this data into the sheets as the truck tickets would come in.
Q Why did you do that?
A To determine which trucks -- basically to determine which drivers are doing a good job from the standpoint of draining the material off and bringing less waste back to the plant.
Q And that would mean more profit for the company, correct?
A Yes.
Q And so you could tell from this spreadsheet which routes Burbank had that were the most profitable to Burbank, correct?
A Not really because these would switch around based

A That's correct, but I don't recall what the number was for. You can tell from the names it's Arby's or like a Ponderosa, a Wendy's. This was looked at on a daily basis. It didn't really matter because the guy can go do a good job one day and a poor job the next day. This would be reviewed at the end of the day, and the next day you could talk to the driver and say how come your truck came back and you only made $1,200 for the whole day? What happened. So it was used as a daily tool.
Q So what was done if it was determined that a driver wasn't profitable that day?
A We would ask him what the issues were. A lot of times it would be an issue with the restaurant, cars parked in the driveway, who knows, or truck broke down.
Q And then what changes were made based on the information you would get?
A It was all relative to the information. Had the guy started a different -- start at a different time the next time he did that store. Call ahead. There's something to change, whatever the problem was, to correct the problem.
Q When you were making this spreadsheet, did you

consider this information to be confidential information to Burbank?
A No. I guess that didn't really dawn on me.
Q If somebody from Kaluzney Brothers came over and said, "Give me your route sheet profitability per truck," would you hand it to them?
A This isn't going to tell them much. What's it going to tell them? Does it list the city? It doesn't list anything. It doesn't tell them anything other than -- if you took all the numbers and looked up, you would say it looks like they're making good money or they're not making too good of money on these routes. What could they gain by having this sheet?
Q Somebody who knew where these routes were --
A You can't. They change all the time. People call in all the time. The grease trap is full. We will slide it over to Billy Bob and he'll do it.
Q This is of no value to a competitor?
A Probably be a value to the EPA or somebody.
Q The question was would this be of any value to a competitor.
A No. None that I can remotely think of.
Q Then why would you have it?
A Because it was of value to Burbank.

A Yes. But can you tell me the name of which K-Mart that is getting pumped? If you gave me this list, I can't tell you -- if you gave this to a competitor, what could they do? What information could they come up with that would be a benefit to them?
Q What's that I'm asking you.
A I see none.
Q So I couldn't take this list and -- let's look at page 6 of this exhibit.
A Okay.
Q No. The actual sixth page of the exhibit. At the top it says Mick starting with 703 Appleton.
A Okay.
Q Do you see what where I'm looking?
A Yes.
Q So I couldn't take this and go to Appleton and find out Colony Oaks, Willie's, McDonald's St. Elizabeth, those particular places in Appleton?
A A lot of these -- how many McDonald's are there in Appleton?
Q I'm asking you if I could take this and go to Appleton and find out where these stores were.
A If it was a specific mom and pop restaurant and if

Q Did you use it at all at United Grease?
A No. We have no routes like that.
Q How do you determine who gets picked up?
A Either they're scheduled, which is on a regular schedule say every three, -- are you referring to Burbank or United? Who do we determine?
Q Yes.
A Since we have so few, they're generally on a schedule every month, every three months whatever it is. Then we change that schedule according to the usage of the restaurant.
Q If you at United decided to expand, buy some more trucks, start getting into the route business, would you consider this information useful?
A No because this is illegal, the way they're pumping the traps. The average pumper, the mom and pop guy -- the guys that run legally cannot do this. This is pretty incriminating stuff if you ask me.
Q You wouldn't want to know the size of the various traps that were pumped?
A The sizing is relevant. However, so is what's in the trap.
Q And based on this sheet you could tell how many pounds would get pumped out, correct?

you worked hard enough, you could figure these out. I guess you could on this sheet because it lists the city.
Q The next column or the next group below that would be 700 Rockford.
A Uh-huh.
Q Do you see that?
A Uh-huh.
Q Is that yes?
A Yes.
Q And if I looked at those places, could I go to Rockford and find those places?
A Yes, if you tried hard enough, I'm sure you could.
Q And on each of those I would know the size of the of the particular trap or facility, correct?
A You don't know whether the size is correct. Burbank didn't have -- I would say 50 percent of their sizing was correct.
Q Who was responsible for that, you?
A The drivers.
Q You told me --
A That's what we were trying to correct.
Q You told me you were trying to correct it.
A Correct. I didn't get real far with it. There's no flow meters on the truck. Half the gauges

didn't work on the trucks. The reason we were trying to do that exercise is because we felt that a lot of the grease traps were misrepresented. The drivers were calling it a 700-gallon trap, and in actuality it was a 500- or a 3,000-gallon trap.

Q And your testimony –

A That's what we were trying to fix.

Q And your testimony was that you didn't get very far in that process?

A That's correct.

Q How far did you get?

A Not far enough.

Q How far did you get? Were you 20 percent done, 30 percent done?

A Minimal. 10, 20 percent.

Q Over what period of time did you do that work?

A That was what I stated before. Probably from September until before I terminated my employment.

Q Okay.

A The only way to accurately do this is you got to have a flow meter on the vehicles. But this is a good indicator of – what we were looking for is indications of what's going on there.

Q So why did you have this information again?

A Because it was on the disk. That's how I would

A I would say you would have to verify that this is correct first. My guess is that it's not correct.

Q You took it, right?

A That's correct.

Q Why did you take it?

A Because it was on the disk.

Q This stuff didn't just appear on the disk.

A But it was on there. I don't know.

Q Somebody had to put the information on the disk, correct?

A Right.

Q Do you recall putting this information on the disk?

A A lot of times –

Q My question is do you recall putting Exhibit No. 16 on the disk.

A No.

Q Let's go back to Exhibit 15 because you gave me the same answer, it was on the disk. Do you recall putting the information for Exhibit 15 on the disk?

A I recall putting this stuff on the disk because we used the disks over and over.

Q What did you put it on the disk for?

A To have the information put on it. The gals in

actually look at it. I would take a disk. The gal would put this item on a disk, and she would give me the disk usually at the end of the day. I would put it in my computer, print it off and look at it or look at it and give it back to her the next day and say, "Here. Put the new ones on."

Q Let's look at Exhibit 16. The first Page is just a tank measurement sheet?

A Yes.

Q How many inches in a tank equals how many gallons in a tank, correct?

A Correct.

Q Why did you have that?

A That's for outside grease tank, grease trap.

Q Was there any reason you needed that at home?

A No.

Q The only use for you would be if you had this same information at your new business so you wouldn't have to recalculate all of that, correct?

A If the tank is different, then you're going to have a different tank.

Q Are you denying that this wouldn't be helpful to someone starting a new business such as United Grease to not have to recreate all of this information?

the office would put this information on the disk, give the disk back to me.

Q What did you do with the disk then once the information was on it?

A I would look at it, print it off, go over it with a driver to show him if he was doing a good job or a bad job and we would repeat the process.

Q So you needed to take this home to do that?

A Like I said, all the stuff was on the disk.

Q The question was did you need to take the disk home to do that.

A I didn't – yes and no. Because on some of the routes we would look at – I would say there's got to be a problem with the size of the trap if the route was just totally unprofitable. Then we could look at the sheet from the trap list and see who it is and all of that stuff and then either call them or have them flag it so the driver could verify that it's 1,200 gallons or 3,000 gallons. Then it needed to be changed.

Q Okay.

A Do you want to keep going back?

Q Exhibit 16 page 2. Tell me what that information is.

A It looks like waste water discharges from the

Burbank facility.
Q Why did you have that on your disk?
A I worked on that so we could reduce our waste water discharges. It was just a matter of tracking the discharge costing going to the city sewer. We were in a dispute with the City of Madison over the way they were sampling our discharge and billing it, so I came up with a program that would say the flow of the material. We always measured everything in biochemical oxygen demand. They used carbonation biochemical oxygen demand. So we had to have a formula to correlate the two. So we went spent a lot of time on figuring that out. SS stands for suspended solids. Further on it stands for total kjehldahl nitrogen and total phosphorus. So the City has a charge that – you can go across the top that says Daily Average Milligrams Per Liter. Here is what it was -- here is the fourth quarter bill. I don't know what the date is on here. They billed us for $12,462 apparently. $6,171 is for suspended solids and $762 for total kjehldahl and $128 for phosphorus. The average pounds per day was the next line down. So this ended up with the total flow times these -- we ended up with a total

United Grease?
A No.
Q Did you use it at all?
A No.
Q Let's look at Exhibit 17.
A Okay.
Q I think we have talked about some of these before in other depositions. This is a collection of five pages. What is contained in Exhibit 17?
A Just the letter to Burbank letting them know that the customer is switching to our service and to go ahead and discontinue their service.
Q Who prepared this particular letter, memo?
A I did.
Q Why did you do that?
MS. BAUMGARTNER: Which particular memo are you referring to?
A The formula?
Q The memo form.
A I made the form so we could just – the customer would sign it and we would just fax it over to Brian and he would take care of making sure that Burbank would pull out their equipment.
Q Why did you do it that way?
A Because you could never get through on the phone

bill of $83,000. We were looking at changing -- you could see we were using the city of Madison data, and they're saying it was $43,000. So what was happening there is that City of DeForest was billing us like $40,000 more than what they should have.
MR. HERMES: Let me take five and go move my car.
(Recess)
Q Mr. Sokolowski, before we had to take a break, you were explaining to me the information contained on the pre-treatment discharge sheet here that's part of Exhibit 16. Why did you have this information on your disk? What was the purpose for it?
A I'll say the same as the others. It was just on there.
Q Who put it on?
A I may have put it on. Another guy may have put it on. Chris Foreman used to work at Burbank. He might have put it on there. I don't know. I would give my disk to different people to do stuff occasionally.
Q Do you recall working on it at home at all?
A I don't know. No, I don't. I don't know.
Q Would any of this information be helpful to you at

to Burbank. This was just a real easy way. You just fax it through.
Q And the section on page 2 I'm looking now –
A Okay.
Q In the section under the Memo – under the word "memo" it says To: Burbank Grease Services, LLC. Did the form say right on it Burbank Grease Services, LLC?
A This is what I would send over, like a fax. It's going to Burbank Grease. Then I would just put this on there and I would usually call Brian or Brian would call me right back and say, "Okay. I got your fax. We'll take care of it."
Q The question was when you made up the form before you had any of your customers' information contained in there, was your form just straight up a form that you had intended to send to Burbank?
A Yes.
Q Did you have anybody else's name in there besides Burbank, any other forms for any other competitors?
A No. There was really no other competitors that we had unless it was a grease trap going to like XYZ septic service.
Q How many of those did you get?

A I have no idea. Not too many. We only got 157 grease traps. We tried to send this out every time we got a new account because then the customer liked it because then the customer could say, well, I signed that form. Why didn't you pull your equipment out yet. I would usually send a copy of this back to the customer after it got sent to Burbank here so they would know that we actually sent it and so on. Actually, Burbank was pretty good. Brian usually took care of pulling out the equipment right away and so on. There was a lot of accounts that we would maybe do the trap work that Burbank still does the grease pick up on that the guys just wanted to split things up, the owners did, that way if they had any problems it was kind of check and balance thing on their part. These are all pretty much identical. These all went to Burbank.

Q These were all accounts of Burbank's that United Grease ended up serving, correct?

A Uh-huh.

Q Is that a yes?

A Specifically to Culver's, Recheck's Food Pride -- I think we still do them. This is Recheck's Food Pride. I think we still do them, yes.

A Uh-huh, yes.

Q I believe you may have referred to that as a trap item?

A No.

MR. BARNARD: We just want to clarify.

A That would be for an outside grease tank.

Q Fryer grease?

A Fryer grease.

Q You did not have any list of fryer grease customers, did you?

A No.

MR. HERMES: All right. That's all I needed.

(Adjourning at 1:27 P.M.)

MR. HERMES: Why don't you give me a couple minutes to talk to Don and we'll come back.

(Recess)

Q Mr. Sokolowski, just one more little series of questions to try to clarify something that we want to make sure is correct. There was a bunch of testimony about the one list that you did have as your testimony was a partial grease trap customer list, correct?

A Correct.

Q And grease trap means the trap that was in the waste water discharge portion of the facility, --

A Correct.

Q -- right?

A Right.

Q When we talked about Exhibit 16, the tank measurement sheet --

A Uh-huh.

Q Do you recall that testimony?

A Uh-huh.

Q Yes?

A Yes.

Q We talked about tank measurement sheet inches in tank?

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, SUSAN MILLEVILLE, a Notary Public in and for the State of Wisconsin, do hereby certify that the foregoing deposition was taken before me at the offices of Eisenberg Law Offices, S.C., Attorneys at Law, 308 East Washington Avenue, City of Madison, County of Dane and State of Wisconsin, on the 31st day of July 2003, that it was taken at the request of the Plaintiff, upon verbal interrogatories; that it was taken in shorthand by me, a competent court reporter and disinterested person approved by all parties in interest and thereafter converted to typewriting using computer-aided transcription; that said deposition is a true record of the deponent's testimony; that the deposition was taken pursuant to notice; that said LARRY S. SOKOLOWSKI, before examination, was sworn by me to testify the truth, the whole truth and nothing but the truth relative to said cause.

Dated August 4, 2003.

Notary Public, State of Wisconsin

COPY

AFFIDAVIT OF DEBORA A. BOHLMAN

STATE OF WISCONSIN :
: SS.
JEFFERSON COUNTY :

DEBORA A. BOHLMAN, being first duly sworn on oath, deposes and says as follows:

1. I am an adult resident of the State of Wisconsin, currently residing at N2431 Highway E, Watertown, WI 53098.

2. Between March 7, 2001 and March 25, 2001, I worked for United Grease, LLC, in the position of receptionist/scheduler/secretary, office clerical duties. I was hired for that position by Larry Sokolowski.

3. During my time of employment, one of the jobs I was directed to do by Mr. Sokolowski was to enter information into United Grease, LLC's computer database. The information that I entered was part of a stack of paper approximately 2 inches thick given to me by Mr. Sokolowski.

4. When Mr. Sokolowski gave me the information to enter into the computer database, he told me that he brought this information with him from his previous employer, which I learned to be Burbank Grease Services, LLC. Mr. Sokolowski told me that he printed this information from Burbank Grease Services, LLC's computer system before he left and took it with him.

5. The information contained on the stack of paper consisted of a customer database, which included customer name, address, phone number, contact person, name of salesman responsible for the customer, what service the customer was receiving, and the

amount being charged the customer for the service. Approximately seven or eight customers were contained on a page.

6. Mr. Sokolowski instructed me how to enter the information into United Grease, LLC's database. I was to type the name, address, phone number, and contact person. In a memo section, I was instructed to type the word "was" and the price being charged the customer by Burbank Grease Services, LLC.

7. During my term of employment, I overheard Mr. Sokolowski contacting various individuals utilizing this printed information to solicit their business by telling the customer that he knew what Burbank Grease Services, LLC was charging the customer, and that he would charge them a lesser amount if they switched their business.

8. I know that two other employees, specifically Linda and Katie, entered some of the information into United Grease, LLC's database. Whenever I entered the information, I used Katie's logon information to do my work. I was not given my own logon access to the system.

DATED this 18 day of June, 2002.

Debora A. Bohlman

Subscribed and sworn to before me
this 18 day of June, 2002.

Notary Public, State of Wisconsin
My Commission: 3006551

STATE OF WISCONSIN

SUPREME COURT

Appeal No. 2004AP468

BURBANK GREASE SERVICES, LLC,

Plaintiff-Appellant-Petitioner,

vs.

LARRY SOKOLOWSKI, UNITED GREASE LLC, and UNITED LIQUID WASTE RECYCLING, INC.,

Trial Court Case No. 02-CV-2397

Defendant-Respondents.

BRIEF OF DEFENDANT-RESPONDENT, LARRY SOKOLOWSKI

On Appeal from the Decision of
the Court of Appeals, District IV
filed January 20, 2005

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ISSUES PRESENTED FOR REVIEW

1. Does Wis. Stat. § 134.90(6)(a) preempt common law claims for unauthorized use of confidential information that does not constitute a trade secret?

The trial court answered "yes."

The court of appeals answered "yes."

2. Does "restricted access information" under Wis. Stat. § 943.70(2)(a)6 include computer data?

The trial court did not specifically address this question.

The court of appeals answered "no."

STATEMENT OF THE CASE

Burbank Grease Services, LLC (hereinafter "Burbank"), filed a six-count Complaint against defendants, Larry Sokolowski (hereinafter "Sokolowski"), United Grease, LLC (hereinafter "United Grease"), and United Liquid Waste Recycling, Inc. (hereinafter "United Liquid Waste"), alleging the following causes of action:

1. Violation of § 943.70(2), Wis. Stats. (computer crime) against Sokolowski (R.2:¶¶ 13-16.)

2. Breach of agency duty against Sokolowski. (R.2:¶¶ 17-23.)

3. Aiding and abetting breach of agency duty against United Grease and United Liquid Waste (R.2:¶¶ 24-29.)

4. Misappropriation of trade secrets against Sokolowski and United Grease. (R.2:¶¶ 30-38.)

5. Interference with business relations against Sokolowski and United Grease. (R.2:¶¶ 39-44.)

6. Conspiracy against Sokolowski, United Grease and United Liquid Waste. (R.2:¶¶ 45-49.)

All parties filed motions for summary judgment and supporting briefs and affidavits in August, 2003. (R.34-46.) A hearing was held on these motions on December 1, 2003, during which the trial court dismissed the causes of action for computer crime (R.71:3-4), misappropriation of trade secrets (R.71:7), tortious interference with contract (R.71:13), and conspiracy (R.71:17). The trial court reserved ruling on the causes of action for breach of agency duty and aiding and abetting the breach of agency duty and scheduled the matter for a further hearing. (R.71:5-6.) That hearing was held on December 11, 2003, during which the court granted defendants'

motions for summary judgment and dismissed plaintiff's claims based on breach of agency duty. (R.72:15.) The trial court entered an Order and Judgment dismissing the entire Complaint on January 4, 2004. (R.56; App. A-1.) Burbank timely filed a notice of appeal on February 10, 2004. (R.62.)

Burbank appealed the trial court's ruling dismissing its causes of action for computer crimes, trade secret violation, breach of agency duty and aiding and abetting breach of agency duty. Burbank did not appeal the trial court's ruling granting summary judgment on its claims for conspiracy and tortious interference with contract. (Burbank's ct. app. brief, p.4.) The court of appeals filed a decision on January 20, 2005, affirming the trial court's grant of summary judgment against Burbank on all four causes of action. (A-Ap. 101-128.) Burbank timely filed a petition for review on the interpretation of Wis. Stat. § 943.70(2) on the computer crimes cause of action and Wis. Stat. § 134.90(6) on the preemption of its claims for breach of agency duty and aiding and abetting breach of agency duty. This Court has accepted Burbank's petition.

STATEMENT OF THE FACTS

Burbank is a Wisconsin limited liability company with offices located in DeForest, Wisconsin. (R.2:¶ 1.) Burbank is in the business of collecting and processing restaurant fry grease, trap grease and industrial grease. (R.2:¶ 5.) Fry grease is collected in large containers at fast food and other restaurants that serve deep fried food. Trap grease is removed from a grease trap that collects grease out of the waste water that flows down a sink or other drain at restaurants and food producers in order to prevent grease and food particles

from going into city sewers. Industrial grease is collected in large quantities from businesses such as cooking operations and food manufacturing facilities. (R.40:Ex.D, p.8; R.40:Ex.C, pp.23-24, 31-32.) Burbank has approximately 11,250 Wisconsin customers and an additional 3,225 customers throughout Illinois, Iowa, Minnesota and Michigan. (R.40:Ex.A, Response 17.)

Sokolowski was an employee of Burbank from November 1, 1996, to April 20, 2001. He was hired as director of operations and was later promoted to territory procurement manager. (R.2:¶¶ 6,9; R.40:Ex.B, pp.17-18.) As territory procurement manager, Sokolowski oversaw Burbank's sales people, managed customer relations with Burbank's industrial accounts, and did spreadsheets and billing. (R.40:Ex.B, p.25.) While Sokolowski was working for Burbank, it was necessary for him to bring work home in order to meet the deadlines imposed. Sokolowski's supervisors were aware that he was working on projects at home. (R.40: Ex. B, pp.45-46.) Throughout his employment with Burbank, Sokolowski was never required to sign a non-compete or non-disclosure agreement. (R.40:Ex.A, Response 26; R.38:Ex.F, Response 2.)

Sokolowski was hired by United Liquid Waste on April 25, 2001. (R.38: Ex. C.) United Liquid Waste hired Sokolowski to solicit new municipal waste accounts. (R.40: Ex. B, pp.38-40.) United Liquid Waste engages primarily in waste water recycling and can recycling and had only about 10 grease trap accounts when Sokolowski started working there. (R.37:¶ 3.)

United Grease was formed by Sokolowski and the owners of United Liquid Waste on October 16, 2001, and began to engage in the business of collection of restaurant fry grease,

trap grease and industrial grease starting in approximately February, 2002. (R.37:¶ 4.)

In late 2001, Sokolowski found Burbank materials that he had inadvertently left at his home while working for Burbank, including: (1) a partial customer list of Burbank's grease trap clients from 2000; (2) a 1998 Burbank grease recycling contract he had drafted; (3) interview questions he had prepared; (4) flowcharts of Burbank employees; (5) a 1998 industrial account spreadsheet; (6) a 1998 spreadsheet of client information organized by truck routes; and (7) a tank measurement sheet that related to a dispute Burbank had with the City of Madison. (R.40:Ex.B, pp.69, 88, 113-18, 132-41, 145-47.) Burbank's counsel sent a letter to Sokolowski dated April 22, 2002, whereby Burbank instructed Sokolowski to destroy all confidential information he had retained from Burbank. (R.38:Ex.O.) In response to this letter, Sokolowski destroyed item (1), the partial customer list. All of these items that were on the computers of United Grease or United Liquid Waste were deleted and a computer disk containing items (2) through (7) was given to Burbank's legal counsel. (R.40:Ex.B, pp.109-10.)

Sokolowski used some of these Burbank materials, including customer information, while working for United Grease. (R.38:Ex.B, pp.69,88,113-18, 132-41, 145-47, Ex. N.)

ARGUMENT

I. STANDARD OF REVIEW.

An appellate court reviews an order for summary judgment de novo, using the same methodology as the circuit court. Yahnke v. Carson, 2000 WI 74, ¶ 10, 236 Wis.2d 257, 613 N.W.2d 102. However, in conducting the review, the appellate court benefits from the analyses of the lower courts. Id.

An issue of statutory interpretation presents a question of law which the Supreme Court reviews de novo, independently of the reasoning of the circuit court and court of appeals, but benefitting from their analyses. State Dept. of Corrections v. Schwarz, 2004 WI App 36, ¶ 11, 275 Wis. 2d 225, 693 N.W.2d 703.

II. WIS. STAT. § 134.90(6)(a) PREEMPTS COMMON LAW CLAIMS FOR UNAUTHORIZED USE OF CONFIDENTIAL INFORMATION EVEN IF IT DOES NOT CONSTITUTE A TRADE SECRET.

The trial court dismissed Burbank's two breach of agency duty claims on the grounds that these claims were preempted by Wis. Stat. § 134.90. (R.72:13-14.) The court of appeals affirmed. (A-Ap.124.)

While Sokolowski agrees with both of these rulings, the trial court could have also dismissed the breach of agency causes of action on their merits as Burbank did not set

forth sufficient facts to support those claims. When a trial court's holding is correct, appellate courts may uphold it on grounds other than those used by the trial court. Wester v. Bruggink, 190 Wis.2d 309, 318, 527 N.W.2d 373 (Ct. App. 1994).

A. Wis. Stat. § 134.90(6) Requires Preemption of a Cause of Action for Misappropriation of Confidential Information.

Wis. Stat. § 134.90(6) explains the effect of the Uniform Trade Secrets Act (UTSA) on other laws. That subsection provides:

> (a) Except as provided in par. (b), this section displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret.
>
> (b) This section does not affect any of the following:
>
> 1. Any contractual remedy, whether or not based upon misappropriation of a trade secret.
>
> 2. Any civil remedy not based upon misappropriation of a trade secret.
>
> 3. Any criminal remedy, whether or not based upon misappropriation of a trade secret.

Wis. Stat. § 134.90(7) provides that the Uniform Trade Secrets Act "shall be applied and construed to make

uniform the law relating to misappropriation of trade secrets among states enacting substantially identical laws." Because there is no Wisconsin case law interpreting this provision, we must look to cases applying other States' versions of the UTSA for authority. The court of appeals properly considered the approaches to the question of preemption taken by other courts interpreting the UTSA and adopted the approach of the great majority of courts.

> We conclude that the purpose of Wis. Stat. § 134.90(6) is to make clear that § 134.90 is intended to provide a single, uniform standard for the type of information that, in the absence of a contract, is entitled to protection from misappropriation under civil law. We construe § 134.90(6) to preempt common law claims for unauthorized use of confidential information that does not meet the statutory definition of a trade secret, as well as common law claims, however denominated, that are based solely on allegations or evidence either of misappropriation of a trade secret in violation of § 134.90(1) and (2) or unauthorized use of confidential information. We conclude that this construction best effectuates the purpose of § 134.90(6).

(Ct. App. Decision, ¶ 37; A-Ap. 122.)

At pages 11-12 of its brief, Burbank essentially argues that this Court should ignore the decisions of other jurisdictions because those decisions are not in unanimous

agreement on this issue and, therefore, "this Court cannot achieve the goal of uniformity of application." Uniformity does not require unanimity, and the court of appeals properly considered the reasoning behind the two competing interpretations and adopted that which "best effectuates the purpose of § 134.90(6)." This Court's further endorsement of this reasoning and the joining of Wisconsin with the majority of courts interpreting the preemption provision of the UTSA will further promote uniformity.

Burbank discusses at length the rules of statutory interpretation and claims that the court of appeals improperly applied those rules by failing to strictly apply the definition of "trade secret." Burbank's analysis is erroneous. First, its fiduciary duty claims *were* claims for misappropriation of a trade secret and were, therefore, properly preempted. Second, there is no claim in Wisconsin for misappropriation of confidential information that does not rise to the level of a trade secret. The legislature was aware of Wisconsin cases holding that there is protection only for trade secrets, not other confidential information, and would have had no reason to include anything but trade secrets within the law's purview. Finally, the court of appeals properly looked to case law in interpreting the UTSA.

1. Burbank's fiduciary duty claims were, in fact, trade secret claims.

Burbank claimed that Sokolowski breached his fiduciary duty by using Burbank's customer information in competition with Burbank after termination of Sokolowski's employment with Burbank. (R.2, ¶¶ 17-29.) This is the same

customer information that Burbank argued was entitled to protection as a trade secret. Burbank was seeking a remedy for misappropriation of a trade secret. The fact that Burbank identified the claim as one for breach of agency duty does not change the character of the claim. The plain language of § 134.90(6) prohibits Burbank from basing that claim on a separate, common law cause of action. This prohibition must continue even after the lower court determined that Burbank's customer information does not constitute a trade secret to effectuate the purpose of § 134.90. As noted by the court of appeals, "[w]hen the common law claims, however denominated, are based solely on the facts that support the statutory claim for a misappropriation of a trade secret, the majority of courts considering this issue have concluded that the common law claims are preempted." (Decision, ¶¶ 31-32 and the cases cited therein; A-Ap. 118.)

Further, the argument that once information is ruled not to be a trade secret it can be protected under common law claims

> would render Section 8 meaningless, for it would forbid preemption of state law claims until a final determination has been made with respect to whether the confidential information at issue rises to the level of a trade secret.

Thomas & Betts Corp. v. Panduit Corp, 108 F. Supp. 2d 968, 972-73 (N.D. Ill. 2000). As the trial court in this case correctly noted:

> In *Thomas & Betts*, they recognize that a company may have difficulty establishing

> that items that they consider to be valuable to them are trade secrets, but they point out at Page 973, that there is a remedy for protection of these items and this is through a contract, so a nondisclosure contract, and, therefore, if there is misappropriation of items covered by the contract, there is indeed a remedy. Obviously that, the plaintiff in this case did not engage in a contract with defendant, Sokolowski, or the co-defendant in this case, and so that remedy is not available to them.

2. The legislature had good reason to include only claims relating to trade secrets within the purview of § 134.90.

The longstanding policy in Wisconsin against restraint of trade supports the interpretation of the UTSA preempting a cause of action for breach of fiduciary duty via misappropriation of confidential information. In Corroon & Black, the Wisconsin Supreme Court held that it would be contrary to public policy to afford protection to insurance agency customer lists where an insurance agent used his former employer's customer list to direct clients to the agent's new insurance agency. Corroon & Black-Rutters & Roberts, Inc. v. Hosch, 109 Wis.2d 290, 297, 325 N.W.2d883 (1982). The law encourages the mobility of workers and as long as an employee takes with him no more than his experience and intellectual development, and no trade secrets or processes are wrongfully appropriated, the law affords no recourse. Gary Van Zeeland Talent, Inc. v. Sandas, 84 Wis.2d 202, 214, 267 N.W.2d 242

(1978); Abbott Laboratories v. Norse Chemical Corp, 33 Wis.2d 445, 463, 147 N.W.2d 529 (1967). Because of the policy against restraint of trade, the loyalty of an employee will be enforced by law only under the unusual circumstance where a "trade secret" is involved. Van Zeeland, 84 Wis.2d at 222. All of these decisions predate the enactment in Wisconsin of the UTSA.

As the trial court noted, it is contrary to public policy to afford protection to material which is generated in the ordinary course of business such as the information in the instant case. (R.72:11-12.) The court concluded that:

> I reviewed these cases. They, I think, give me a feeling for, and understanding of the law in Wisconsin regarding the level of protection that should be afforded to ordinary business information versus that special category of information which meets the standards of being trade secrets. I find that the elements of the breach of fiduciary duty are essentially the same as theft of a trade secret, and I have concluded that in Wisconsin law, that the Trade Secret Act preemption, a common law claim of breach of fiduciary duty where that breach of duty is misappropriation of business information, the Trade Secret Act establishes a level of a particular quality of information that should be protected against what might otherwise be a completely free enterprise. I think recognizing the breach of agency claim here would disregard the legislature's

> decision regarding the appropriate balance between competition and encouragement of development of beneficial trade secrets.

(R.72:13-14.)

The legislature is presumed to have been aware of this line of cases at the time it enacted the UTSA and would have had no reason to eliminate a cause of action for misappropriation of "confidential information" since that cause of action was already non-existent in Wisconsin.

3. Statutory interpretation in Wisconsin includes a history of applying case law and other extrinsic sources even where the plain meaning of the statute is not ambiguous.

While this Court routinely states the rule that it will not resort to extrinsic sources when the meaning of the text is unambiguous, there are a large number of cases where the Court nonetheless examines sources beyond the specific text to determine the meaning of the language without finding the text to be ambiguous. In re Commitment of Byers, 2003 WI 86, ¶ 46, 263 Wis.2d 113, 665 N.W.2d 729 (Abrahamson, J. concurring). In VanCleve v. City of Marinette, 2003 WI 2, 258 Wis.2d 80, 655 N.W.2d 113, the Court looked to case law and legislative history to properly construe a statute. Id., 2003 WI 2, ¶ 23. In Fox v. Catholic Knights Ins. Co., 2003 WI 87, 263 Wis.2d 207, 665 N.W.2d 181, the Court examined legislative history to support interpretation of unambiguous language.

Further, this Court has recognized that even a clear and unambiguous statute could be construed contrary to its plain meaning "if a literal application would lead to an absurd or unreasonable result." State v. Delaney, 2003 WI 9, ¶ 15, 259 Wis.2d 77, 658 N.W.2d 416.

With regard to § 134.90, particularly because it is a uniform statute which is to be interpreted in such a manner to provide uniformity, it is imperative that the Court look to cases interpreting the statute in other jurisdictions.

The court of appeals' interpretation of this statute is further confirmed by the legislative history. The UTSA became effective April 24, 1986. The comments to 1985 Act 236, which created § 134.90, provide that:

> The contribution of the Uniform Act is substitution of unitary definitions of trade secret and trade secret misappropriation and a single statute of limitations for the various property, quasi-contractual, and *violation of fiduciary relationship* theories of noncontractual liability utilized at common law.

(Emphasis added). This language clearly indicates that the UTSA was intended to replace all common law causes of action based on a breach of fiduciary duty.

Finally, literal application of the term "trade secret" as urged by Burbank would lead to the absurd result of providing the protection of a restrictive covenant to an employer where none was bargained for between the employer and employee. This would also contravene Wisconsin's long-

standing policy in favor of employee mobility. *See*, Van Zeeland, 84 Wis.2d at 214; Abbott, 33 Wis.2d at 463.

B. The Lower Court Decisions Granting Summary Judgment Should Also Be Affirmed Because Burbank Presented No Material Facts to Support its Claims of Breach of Agency Duty.

Wisconsin Jury Instruction - Civil 4020 provides that an agent is compelled to discharge his duties faithfully so as to protect and serve the best interest of his principal. Burbank claimed in its complaint that "it is inevitable that Sokolowski will disclose and/or use the confidential and trade secret information of Burbank for the benefit of United Grease." (R.2:¶ 20.)

Burbank cites the *Restatement (Second) of Agency*, § 396, for the proposition that Sokolowski had an obligation not to use confidential information even after the agency relationship was terminated. Burbank has not, however, cited any Wisconsin cases recognizing this to be the law in Wisconsin. In fact, a number of Wisconsin cases would seem to indicate otherwise. In Corroon & Black, the Wisconsin Supreme Court held that it would be contrary to public policy to afford protection to insurance agency customer lists where an insurance agent used his former employer's customer list to direct clients to the agent's new insurance agency. Id., 109 Wis.2d at 297. The law encourages the mobility of workers and as long as an employee takes with him no more than his experience and intellectual development, and no trade secrets or processes are wrongfully appropriated, the law affords no

recourse. Van Zeeland, 84 Wis.2d at 214; Abbott, 33 Wis.2d at 463. Because of this policy against restraint of trade, the loyalty of an employee will be enforced by law only under the unusual circumstance where a "trade secret" is involved. Van Zeeland, 84 Wis.2d at 222.

Wisconsin's policy in favor of employee mobility is also demonstrated by the case law striking down unduly prohibitive restrictive covenants of employment agreements. A restraint of trade is tolerated "only to the extent absolutely necessary to afford reasonable protection." Van Zeeland, 84 Wis.2d at 218. *See also*, General Medical Corp. v. Kobs, 179 Wis.2d 422, 507 N.W.2d 381 (Ct. App. 1993).

Burbank is asking the courts to impose a restrictive covenant of non-competition or confidentiality on Sokolowski even though the parties had not bargained for such restrictions. Burbank's cause of action for breach of agency duty was properly dismissed.

III. THE TRIAL COURT PROPERLY DISMISSED ON SUMMARY JUDGMENT BURBANK'S CAUSE OF ACTION FOR A COMPUTER CRIME VIOLATION, CONTRARY TO WIS. STAT. § 943.70(2).

Wis. Stat. § 943.70(2)(a) provides as follows:

> (2) OFFENSES AGAINST COMPUTER DATA AND PROGRAMS. (a) Whoever willfully, knowingly and without

> authorization does any of the following may be penalized as provided in pars. (b) and (c):
>
> 1. Modifies data, computer programs or supporting documentation.
>
> 2. Destroys data, computer programs or supporting documentation.
>
> 3. Accesses computer programs or supporting documentation.
>
> 4. Takes possession of data, computer programs or supporting documentation.
>
> 5. Copies data, computer programs or supporting documentation.
>
> 6. Discloses restricted access codes or other restricted access information to unauthorized persons.

Burbank argues that Sokolowski violated Wis. Stat. § 943.70(2)(a)6 by disclosing Burbank's computer data to United Grease. (Burbank ct. app. brief, pp.44-46.)

A. "Restricted Access Information" Does Not Include Computer Data.

The court of appeals ruled that

> The phrase "[a]ccess codes or other restricted access information" plainly refers to codes, passwords, or other information that permits access to a computer system or to programs or data within a system; the phrase does not refer to the system, program, or data accessed. Thus, subd. 6 plainly does not prohibit

> disclosure of data that is obtained as a result of using a restrictive (sic) access code.

(Decision, ¶ 45; A-Ap. 127.)

Burbank argues that all data on a computer with restricted access is "restricted access information." If this is what the legislature intended, it could have drafted the statute much more succinctly by changing § 943.70(2)(a)5 to "Copies or discloses to unauthorized persons." In the alternative, the legislature could have used the phrase "data, computer programs or supporting documentation" in § 943.70(2)(a)6. The legislature chose the term "restricted access information" for a reason and that purpose must be given effect. The court of appeals' interpretation gives effect to those language choices. Burbank's does not.

Further, this statute is a criminal law relating to computers. It is intended to prevent the theft or vandalism of computer data. An individual who has legally obtained data from a computer should not be subject to this section merely by disclosing it without proper authority. It is not a crime to disclose confidential information to others, regardless of whether its source is a computer or a filing cabinet. Burbank's interpretation would lead to the absurd result of criminalizing unauthorized disclosure of confidential information even if it was originally obtained with proper authority.

Burbank complains that it is left without a remedy if disclosure of this information is not a computer crime. In the absence of a trade secret, an employer who wants to protect against such disclosure, and who wants to have a legal remedy in the event such disclosure occurs, must enter into a

confidentiality or non-disclosure agreement with its employee. Burbank did not enter into such an agreement with Sokolowski and the lower courts properly refused to give Burbank the benefit of a bargain that was not made.

B. Burbank Failed to Demonstrate a Genuine Issue of Material Fact as to a violation of § 943.70(2)(a)6.

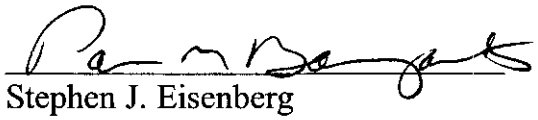
The court of appeals properly found that there is no evidence in the record to show a violation of Wis. Stat. § 943.70(2)(a)6. "That is, the deficiency is not only a pleading deficiency but also a lack of any proof that Sokolowski violated subd. 6." (Decision, ¶ 46; A-Ap. 127.) There is no evidence in the record that Sokolowski improperly disclosed any restricted access codes or information. This cause of action was properly dismissed.

CONCLUSION

For all the foregoing reasons, defendant-respondent, Larry Sokolowski, respectfully requests that the Court affirm both the trial court's Order and Judgment dismissing the Complaint and the court of appeals' decision in the above-entitled case.

Dated this 29th day of June, 2005.

EISENBERG LAW OFFICES, S.C.



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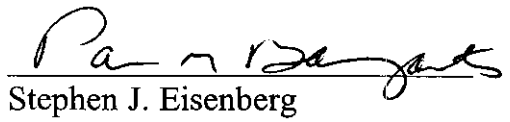
CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional font. The length of this brief is 4,028 words.

Dated this 29th day of June, 2005.

EISENBERG LAW OFFICES, S.C.



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STATE OF WISCONSIN
SUPREME COURT
CASE NO. 2004AP0468

BURBANK GREASE SERVICES, LLC,

Plaintiff-Appellant,

v.

LARRY SOKOLOWSKI, UNITED GREASE, LLC,
and UNITED LIQUID WASTE RECYCLING, INC.,

Defendants-Respondents.

ON REVIEW FROM COURT OF APPEALS
DISTRICT IV, APPEAL NO. 2004AP0468

BRIEF OF DEFENDANTS-RESPONDENTS UNITED GREASE, LLC AND UNITED LIQUID WASTE RECYCLING, INC.

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STATEMENT OF THE ISSUE

1. Does Wis. Stat. §134.90(6) preempt a common law cause of action for allegedly aiding and abetting an employee's breach of a duty of loyalty to his former employer, where such cause of action is based on the misappropriation of confidential information?

The trial court said yes.

The court of appeals said yes.

STATEMENT OF THE CASE

THE NATURE OF THE CASE, ITS PROCEDURAL STATUS AND DISPOSITION IN THE TRIAL COURT.

This action was commenced on July 31, 2002, by appellant-petitioner, Burbank Grease Services, LLC ("Burbank"), against respondents, Larry Sokolowski ("Sokolowski"), United Grease, LLC ("United Grease")[1], and

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[1] United Grease, LLC converted to a Wisconsin corporation in January of 2004 and is now known as United Grease, Inc.

United Liquid Waste Recycling, Inc. ("United Liquid Waste").

Burbank made six claims: (1) Sokolowski committed a computer crime in violation of Wis. Stat. §943.70 by taking and using Burbank's customer list information after leaving Burbank; (2) Sokolowski breached an agency duty to Burbank by misappropriating Burbank's confidential, proprietary, and trade secret customer list information in post-employment competition with Burbank; (3) United Grease and United Liquid Waste aided and abetted Sokolowski in breaching his agency duty to Burbank; (4) Burbank's customer list information constitutes trade secrets and Sokolowski and United Grease intentionally misappropriated them; (5) Burbank and United Grease tortiously interfered with Burbank's customer contracts through their improper use of Burbank's customer list information; and (6) Sokolowski,

United Grease and United Liquid Waste conspired to use Burbank's confidential and trade secret customer list information in violation of Wis. Stat. §134.01. As part of Burbank's prayer for relief, it asks that all respondents refrain for a period of five years from doing any business with any Burbank customers existing at the time Sokolowski terminated his employment. [R2.]

The parties filed cross motions for summary judgment. [R42, R44.] On December 1, 2003, and December 11, 2003, The Honorable Diane M. Nicks granted respondents' motions for summary judgment with respect to all six claims. [R71, R72.]

Burbank appealed the circuit court's judgment, but only with respect to its (1) computer crime claim against Sokolowski (not United), (2) trade secret claim against Sokolowski and United Grease, (3) breach of agency duty

claim against Sokolowski, and (4) claim that United Grease and United Liquid Waste aided and abetted Sokolowski in breaching his agency duty to Burbank. [App. Br. at p. 4].

On January 20, 2005, the court of appeals filed its published opinion upholding the circuit court's judgment, finding that Burbank's Customer Information did not rise to the level of a trade secret under §134.90; that Sokolowski did not violate §943.70(2)(a)6 (computer crime statute); and that Burbank's breach of agency claim against Sokolowski and its related aiding and abetting claims against United Liquid and United Grease are preempted by §134.90(6).

Burbank now asks this Court to review the court of appeals judgment, but only with respect to two issues: (1) whether Wis. Stat. §134.90(6) preempts common law causes of action, such as a former employee's breach of a duty of loyalty to his former employer, where such cause of action is

based on the misappropriation of confidential information that does not rise to the level of a "trade secret" as defined in Wis. Stat. §134.90(1)(c); and (2) whether disclosure of confidential or proprietary data is a disclosure of "restricted access information" pursuant to Wis. Stat. §943.70(2)(a)6.[2]

STATEMENT OF FACT

Burbank is in the business of collecting and processing restaurant fry grease, grease traps, and industrial grease. With approximately 11,250 Wisconsin customers, it is the largest grease collection and processing operation in the state. It has an additional 3,225 customers throughout Illinois, Iowa, Minnesota, and Michigan. [R38:13, Response 17]. While Burbank does have a few Wisconsin competitors, it is so prevalent that it has enjoyed a near monopoly status in many

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[2] We do not address the §943.70 issue, because that claim is only against Sokolowski.

areas of the state. [R38:43-44 at pp. 68, 72].

Sokolowski worked for Burbank from November of 1997 to April 20, 2001. [(R38:66, 28 at p. 8]. He was initially hired as the director of Burbank's operations in DeForest, Wisconsin, overseeing plant operations as well as the collection and transportation side of the business. [R38:30 at p. 13]. Six months prior to leaving Burbank, he was made territory manager. [R38:31 at pp. 17,18]. As territory manager, he oversaw Burbank's sales people and managed customer relations with Burbank's 6 or 7 industrial accounts. [R38:24, 33]. He also prepared spreadsheets and billing for the accounting department, and worked on numerous projects assigned to him by his superiors. [R38:33 at p. 25]. Throughout the term of his employment he was never required to sign a non-compete or non-disclosure agreement. [R38:15 at Response 26; 86 at Resp. to Req. to Admit No. 2].

Burbank kept all of its customer list information, as well as other information, on a new Excel type database program known as General Territory Entry Program ("GTEP"). [R38:105-106 at pp. 27-32]. Such customer list information maintained by Burbank included customer names, addresses, telephone numbers, contact person, pricing information, type of service, and frequency of service. [R38:5 at Response 2]. The customer list information changed daily with approximately 12 changes to the customer list per day–some of which were price changes. [R38: 123-124 at pp. 17-24;6 at Response 3].

GTEP could be accessed by anyone with a password. [R 38:11-12 at Response 15;108 at p. 42]. During the term of Sokolowski's employment, at least 17 employees, including Sokolowski, had passwords. *Id.*

In addition to the many Burbank employees with access to customer information, many employees, such as salesmen and management, were authorized to print out or download to a computer disk such information and take it with them on their routes and/or to take it home with them. [R38:8-9, 11 at Responses 7 and 15,105-106 at pp. 28-30].

Sokolowski had numerous projects assigned to him by his superiors, including, for example, determining the efficiency of drivers, increasing the accuracy of Burbank's pricing on grease traps, drafting contracts, preparing interview questions, etc. [R 38:37, 54-63 at pp. 44, 111-147]. Sokolowski took customer list information home with him for use in working on such projects throughout his employment. [R38:37, 54-63 at pp. 43-54, 111-147].

Anamax[3] required Burbank managers (just managers) to acknowledge the Anamax Code of Conduct ("Code of Conduct"). [R38:10 at Response 11]. The Code of Conduct specifically provides, in relevant part (Paragraph 8):

> No Anamax employee shall disclose any confidential or privileged information to any person within the Company who does not have a need to know or to any outside individual or organization except as required in the normal course of business.

[R38:144, No. 8]. The Code of Conduct does not define what constitutes "confidential or privileged information." *Id.* Sokolowski, on October 14, 1998, acknowledged in writing that he had received and understood the Code of Conduct. Id.

Then, perhaps as early as April 1999, approximately one-half year after signing the Code of Conduct, Anamax introduced an employee handbook ("Employee Handbook")

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[3]Anamax Group ("Anamax") purchased Burbank in 1998, although Burbank retained its name. [R38:105-106].

which was distributed to Burbank employees, including Sokolowski. [R38:33 at pp. 27-28]. The Employee Handbook states that it is not a contract, that Burbank will schedule an exit interview when employees leave which will afford the employee an opportunity to return Burbank's property, and the following non-disclosure provision:

> NON-DISCLOSURE
>
> The protection of confidential business information and trade secrets is vital to the interests and the success of The Anamax Group. Such confidential information includes, but is not limited to, the following examples:
>
> *Computer Process
> *Computer Programs and Codes
> *Customer Lists
> *Financial Information
> *Marketing Strategies
> *New Materials Research
> *Pending Projects and Proposals
> *Proprietary Production Processes
> *Research and Development Strategies
> *Technological Data
> *Technological Prototypes
>
> *Employees who are exposed to confidential information may be required to sign a non-disclosure agreement as a condition of employment.* Employees who improperly

> use or disclose trade secrets or confidential business information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit from the disclosed information.

[R38:149-152 at pp. 2, 53, 97, and102(emphasis added)]. The Employee Handbook does not define "Customer Lists."

On April 20, 2001, Sokolowski turned in his notice of resignation. [R2:3 at ¶ 9]. An exit interview was not requested of him and he was not asked to return any Burbank material that remained in his possession. [R36:1-2 at ¶ 3].

Prior to leaving Burbank, Sokolowski testified that he had only a few conversations with Robert Tracy, Jr. (President and part owner of United Liquid) and that they did not develop any type of business plan to go after grease accounts. [R38:36, 37, 43, 44 at pp. 37, 41-42, 65-67, 69-70, 72]. Robert Tracy, Jr. similarly testified. [R38:71-71 at pp. 14-18]. Each deposed employee of Burbank testified that they had no

knowledge of Sokolowski competing or preparing to compete with Burbank prior to the termination of his employment. [R38:115 at 65, 123 at 18, 141 at 50-51, 157-158 at 12-14, 180 at p70-72].

After leaving, Sokolowski took a job with United Liquid Waste, which provides waste and cake sludge waste hauling services to industrial, municipal, and commercial clients in Wisconsin. [R39:1 at ¶ 2]. In addition, it provides glass, can, and plastic recycling. *Id.* Although having the ability to handle grease trap collection, it was and is still an extremely small part of its business, having only ten or so small grease trap clients. [R39:1 at ¶ 2; R38: 43 at p. 68]. United Liquid Waste was interested in Sokolowski because of his background in liquid waste and his proven ability to obtain municipal clients (not grease clients). [R38:37 at pp. 38-40, 43 at p. 66].

When he was hired, it was agreed that if he attained certain sales goals (not grease sales), the owners of United Liquid Waste and Sokolowski would form a new company. [R 38:37 at p. 42]. However, at the time he was hired, the formation of such a business was nothing more than a possibility. Moreover, the type of that business, whether it be a food processing, grease collection/processing, etc., was never agreed upon or known until much later. *Id.*

Sokolowski did attain his sales goal for United Liquid Waste and in or about October 2001, Sokolowski and owners of United Liquid Waste decided that because of Burbank's virtual monopoly on grease collection and processing in their area, a competing company would be a potentially good business opportunity. [R38:37 at pp. 42, 45 at pp. 72-74].

The group decided to form United Grease, which was formally organized on October 16, 2001. [R38:81].

Sokolowski was appointed the manager and was responsible for the company's operation.

Shortly after United Grease was formed, late in 2001, Sokolowski testified that he found Burbank materials that he inadvertently left in his home from his various take-home projects, including the following items: (1) a partial customer list of Burbank's grease trap clients from 2000; (2) a list of 1998 Burbank payment charts, mainly for industrial clients, on an Excel spreadsheet; and (3) a 1998 spreadsheet of client information organized by truck routes.[4] [R38:44, 48, 55-56, 59-62, 63]. Such information is hereafter collectively referred to as Burbank's "Customer Information."

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[4] Sokolowski also had in his possession flowcharts of Burbank employees; interview questions he had prepared; a 1998 Burbank grease recycling contract he had drafted; and a tank measurement sheet that related to a dispute Burbank had with the City of Madison. [R38:44, 48, 55-56, 59-62, 66, 185-189, 193]. Burbank does not consider these items relevant as it does not mention them in its brief.

Examples of the actual 2000 partial grease trap customer list do not exist because Sokolowski destroyed it as instructed by Burbank's legal counsel in correspondence of April 22, 2002. [R38:190-192 at p. 63; 195-196]. However, it is not in dispute that the list developed by Sokolowski contained some customer names, addresses, some phone numbers, contact persons, total gallons for the grease traps, and some price information for small restaurants.[5]

Examples of the 1998 Excel spreadsheet of industrial account information and the 1998 truck route information are found at R38:190-192 (for Excel spreadsheet examples, see

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[5] Burbank generally states in its brief at pages 3-4 that Sokolowski had in his possession Burbank's customer list which included prices being charged. As a point of clarification, there is nothing in the record to contradict Sokolowski's testimony that this was only a partial grease trap list from 2000 with only partial pricing information. [See, for example, R38:48 at p. 88]; and *Burbank Grease Services, LLC v. Sokolowski*, 2005 WI App 28, ¶ 5, 278 Wis. 2d 698, 693 N.W.2d 89.

sheet marked "Exhibit 14" at the bottom and sheet directly before it, and for example of truck route information, see sheet directly after Exhibit 14). Aside from the destruction of the 2000 partial grease trap list, the other two categories, to the extent they were on United Grease's or United Liquid Waste's computer, were deleted and the computer disks containing that information were given to Burbank's legal counsel, with no copies retained by the respondents. [R38:54 at pp. 109-110].

After United Grease was formed, Sokolowski did use some of the Customer Information. He used Burbank's 1998 Excel spreadsheet format for industrial clients to develop a similar report format for United Grease in or about January 10, 2002, and he had some of the information from the 2000 partial grease trap list entered into a computer used by United

Grease and used some of that information in soliciting Burbank customers. [R38: 44, 48, 55-56, 59-63, 188, 190].

The industrial account information contained a pricing formula. The formula in the industrial spreadsheets was nothing more than a simple calculation of how many pounds of oil were collected multiplied by the market rate, less a processing fee. [R38:50-51 at pp. 93-97]. And, this information was standard in the industry, Burbank even having derived it from a competitor. *Id., Burbank Grease Services*, 2005 WI App 28, at ¶ 19. These facts are not in dispute.

The undisputed testimony shows that the driver route spreadsheets came from one of Sokolowski's "take home" projects in which he was trying to correct the size of Burbank's customer's grease traps, of which only about 50% were correct. The incorrect size led to unreliable pricing and

revenue numbers. [R38:61-62; R47:14]. The route spreadsheet shows a truck driver's name, a route number for the client, the name of the client, and the city. For example, for Milwaukee, the list shows among other clients two K-Marts, an Applebees, a KFC, and an Olive Garden restaurant. [R38:192]. No client addresses are provided. [R38:60-62]. Without addresses, a competitor can not determine which stores are being referenced. Finally, there is nothing in the record to suggest that Sokolowski ever used the truck route information against Burbank's interest. *Id.*

APPLICABLE STATUTE

Wis. Stat. § 134.90 provides:

> (1) DEFINITIONS. In this section:
>
> ...
>
> (c) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique or process to which all of the following apply:

1. The information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

...

(2) MISAPPROPRIATION. No person, including the state, may misappropriate or threaten to misappropriate a trade secret by doing any of the following:

(a) Acquiring the trade secret of another by means which the person knows or has reason to know constitute improper means.

(b) Disclosing or using without express or implied consent a trade secret of another if the person did any of the following:

1. Used improper means to acquire knowledge of the trade secret.

2. At the time of disclosure or use, knew or had reason to know that he or she obtained knowledge of the trade secret through any of the following means:

a. Deriving it from or through a person who utilized improper means to acquire it.

b. Acquiring it under circumstances giving rise to a duty to maintain its secrecy or limits its use.

c. Deriving it from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limits its use.

d. Acquiring it by accident or mistake.

...

(6) EFFECT ON OTHER LAWS. (a) Except as provided in par. (b), this section displaces conflicting tort law, restitutionary law and any other law of this state providing a civil remedy for misappropriation of a trade secret.

(b) This section does not affect any of the following:

1. Any contractual remedy, whether or not based upon misappropriation of a trade secret.

2. Any civil remedy not based upon misappropriation of a trade secret.

3. Any criminal remedy, whether or not based upon misappropriation of a trade secret.

(7) UNIFORMITY OF APPLICATION AND CONSTRUCTION. This section shall be applied and construed to make uniform the law relating to misappropriation of trade secrets among states enacting substantially identical laws.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONSTRUED WIS. STAT. § 134.90(6) AS PREEMPTING CLAIMS BASED ON THE UNAUTHORIZED USE OF CONFIDENTIAL INFORMATION.

Both the trial court and the court of appeals determined that the customer information retained by Sokolowski did not meet the statutory definition of a trade secret. Burbank does not challenge that finding in its brief. Rather, Burbank seeks to revive its claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, because it believes that a claim for unauthorized use of confidential information is not preempted by the Wisconsin Uniform Trade Secrets Act (WUTSA), Wis. Stat. § 134.90.

A. Standard of Review

This case involves a question concerning the scope of Wis. Stat. § 134.90(6). When analyzing a statute, this Court has held that the "interpretation and application of a statute to a given set of facts is a question of law for our independent review." *World Wide Prosthetic Supply, Inc. v. Mikulsky*, 2002 WI 26, ¶ 8, 251 Wis. 2d 45, 54-55, 640 N.W.2d 764.

B. The court of appeals' interpretation is consistent with the intent of the legislature.

The aim of all statutory construction is to discern the intent of the legislature. *Milwaukee County v. Department of Industry, Labor and Human Relations Comm'n*, 80 Wis. 2d 445, 451, 259 N.W.2d 118 (1977). The "cardinal rule" of statutory construction is that "the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act." *Id.* at 453.

The intent of the legislature in passing Wis. Stat. § 134.90 is obvious from the face of the statute itself. The title of the chapter is the **Uniform** Trade Secrets Act. Sub. (7) requires that the statute be applied **uniformly** with the laws relating to misappropriation of trade secrets in other states. Sub. (6) preempts the application of other kinds of state law to the subject matter. Clearly the intent of the legislature was to create a **uniform** system for resolving claims involving allegations of the misuse of confidential information and to eliminate other, inconsistent types of laws.

The court of appeals' interpretation of Wis. Stat. § 134.90 (6) will logically lead to a more consistent, more uniform system. It makes no sense to say that a claim based on all the same factual allegations as a misappropriation-of-trade-secrets claim will be handled differently by the courts depending on whether or not the plaintiff uses the magic

words "trade secret" in the complaint. If parties can pursue their claims outside the statutory scheme by a simple trick of semantics, then the goal of uniformity will never be achieved.

C. Burbank's interpretation of the statute would lead to illogical or absurd results.

The implications of Burbank's argument are interesting. Suppose a party makes a claim for misappropriation of a trade secret, the judge decides it is a question of fact whether the confidential information at issue rises to the level of a trade secret, and the case goes to trial. At trial, the jury determines that no trade secret was misappropriated. That would mean that the claim was never actually covered by WUTSA, though it had been litigated through trial on that theory.

Burbank argues that the court of appeals' interpretation of the statute leaves it without a remedy.

However, the statute does not leave Burbank without a remedy because it was misinterpreted by the court of appeals. Rather, it leaves Burbank without a remedy because Burbank has not been the victim of a tort.

D. The court of appeals' interpretation harmonizes all clauses in the statute.

Each part of a statute should be construed in connection with every other part so as to produce a "harmonious whole." *Milwaukee County*, 80 Wis. 2d at 454, n. 14. In construing statutes, "effect is to be given, if possible, to each and every word, clause and sentence in a statute, and a construction that would result in any portion of a statute being superfluous should be avoided wherever possible." *Columbia County v. Bylewski*, 94 Wis. 2d 153, 164, 288 N.W.2d 129 (1980).

The plain language of Wis. Stat. § 134.90(7) says that it should be interpreted uniformly with the law in other states. The court of appeals followed the requisite procedure when it construed the statute only after looking at the law as it currently stands in other jurisdictions, finding that the "great majority of courts" conclude that claims such as Burbank's are preempted by §134.90(6). *Burbank Grease Services, LLC*, 2005 WI App 28, at ¶¶ 31-37. Contrary to the assertions of Burbank, this was a crucial part of the statutory analysis, not an indication that the court failed to conduct any statutory analysis.

On the other hand, Burbank's reading of the statute does not give effect to every word and clause. It is essentially asking this Court to disregard sub. (7), the uniformity clause, and rendering it surplusage. Such a reading would conflict

with the rules of statutory construction that Burbank itself has relied on so heavily. [App. Br. at 20-21.]

E. The court of appeals' interpretation is consistent with Wisconsin precedent on preemption.

Most discussion of preemption principles in Wisconsin law seems to arise in the context of federal preemption of state law. However, many of the principles enunciated in those cases are instructive in the present case.

For example, the court of appeals recently discussed federal preemption of state tort law in the aviation context. *Miezin v. Midwest Express Airlines, Inc.*, 2005 WI App 120. A passenger who was diagnosed with deep vein thrombosis after two flights on the defendant's airline brought a claim against the airline for failing to warn him about the dangers of developing this condition.

The court of appeals said that the claim was impliedly preempted by the Federal Aviation Act. *Miezin*, 2005 WI App 120, at ¶ 2. The court's reasoning was based in large part on the fact that "the whole tenor" and "the principal purpose" of the Act was "to create and enforce *one unified system* of flight rules." *Id.*, ¶ 17. Allowing state juries to decide which warnings were appropriate would conflict with the federal scheme and would likely lead to inconsistent verdicts in different jurisdictions. *Id.*, ¶ 16-17.

So, too, with regard to Wis. Stat. § 134.90, the legislature indicated an intent to create a uniform system for regulating disputes over misappropriation of trade secrets. To allow plaintiffs to pursue claims substantially similar to trade secret claims while disregarding WUTSA would inevitably lead to inconsistency in the resolution of

disagreements over the use of allegedly confidential information. That would defeat the purpose of the statute.

Additional guidance on preemption can be found in *Boyle v. Chrysler Corp.*, 177 Wis. 2d 207, 501 N.W.2d 865 (Ct. App. 1993), where the court of appeals considered a claim by a plaintiff who had been injured in a motor vehicle accident. She was not wearing her seat belt at the time of the accident and filed suit against the vehicle manufacturer, arguing that the car was defective because it did not contain an airbag or passive restraints. At issue was whether the plaintiff could pursue her claim under Wisconsin common law in light of a federal statute forbidding states from requiring equipment in motor vehicles that was not identical to the federal standard.

The plaintiff contended that, because the federal statute did not specifically mention common-law claims, they

were not preempted. *Boyle*, 177 Wis. 2d at 217. The court of appeals rejected that assertion, noting that the United States Supreme Court has defined the term "state law" to include the common law. *Id.* The court then concluded that imposing common-law liability on manufacturers under state law would create a conflict with the federal standards. *Id.*

The plaintiff also argued that her claim was preserved under a savings clause in the statute which said: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Once again, the court rejected the plaintiff's argument, because "[g]eneral savings clauses cannot be read to permit common-law actions that contradict and subvert a statutory scheme." *Id.* at 218. The savings clause only preserved claims that did not conflict with the federal standards. *Id.*

Furthermore, as an alternative basis for its holding, the court of appeals found that the plaintiff's claim was implicitly preempted. *Boyle*, 177 Wis. 2d at 219. Implicit preemption may be found where state law conflicts with the objectives of the legislation or interferes with the methods chosen to accomplish the legislative intent. *Id.* The plaintiff's claim failed on both counts, as recognizing common-law liability in her case would have indirectly allowed the state to impose additional safety requirements on manufacturers. *Id.* at 220-21.

Particularly informative in *Boyle* was the court's discussion of the relationship between an explicit preemption clause and a savings clause. *Boyle*, 177 Wis. 2d at 221. The court of appeals considered and rejected the plaintiff's contention that the existence of an explicit preemption clause provided "a reliable indicium of congressional intent" and

therefore obviated the need to infer an intent to preempt state law. *Id.*

> The Federal Motor Vehicle Safety Act...contains two clauses dealing with preemption, one of which is a savings clause that apparently conflicts with the explicit preemption clause. To give effect to the entire Act, we must look at the explicit preemption clause together with the savings clause and construe them harmoniously....Because the explicit preemption clause and the savings clause appear to conflict, neither clause "provides a reliable indicium of congressional intent with respect to state authority." The existence of two clauses dealing with preemption that appear to conflict compels us to look beyond the express preemption provision.

Id. at 222 [internal citations omitted].

As seen in *Boyle*, explicit preemption may be found in a statute even in the absence of a particular phrase that one party deems important. In *Boyle*, the federal statute was found to specifically apply to common law claims even though it did not use the term "common law." As for Wis. Stat. § 134.90(6)(a), Burbank asserts that it can only apply to "trade secrets" because it does not include the qualifying phrase "and confidential information that may not meet the

statutory definition for a trade secret." As *Boyle* demonstrates, that is not true. It is appropriate to interpret statutory phrases to include closely related concepts if the context warrants it. If Wis. Stat. §134.90(6) applies to trade secrets, then it is quite logical to apply it with equal force to claims that are mistakenly alleged to be trade secrets.

Both Wis. Stat. § 134.90(6) and the statute at issue in *Boyle* contain savings clauses. Burbank relies heavily on the savings clause in Wis. Stat. §134.90(6)(b)2., which says that preemption does not apply to "[a]ny civil remedy not based upon misappropriation of a trade secret." However, the savings clause cannot be read in a way that would "contradict and subvert a statutory scheme." If a plaintiff could simply make an end-run around the requirements of Wis. Stat. § 134.90 by denominating information as "confidential" rather

than as a "trade secret," it undoubtedly would subvert the purpose of the statute.

In addition to the explicit preemption of other state laws regarding trade secrets, Wis. Stat. § 134.90(6) can be read to implicitly preempt them. The purpose of the statute was to make Wisconsin law on misappropriation of trade secrets consistent with the law in other states. If plaintiffs are able to avoid the application of the statute by subtly rewording their complaints, then that purpose has been defeated. The legislature's chosen means of attaining the goal of uniformity would be hindered as well.

Moreover, the Court should take into consideration the existence here of both a preemption clause and a savings clause. The Court is charged with the task of interpreting the statute as a whole. To the extent that the preemption and savings clauses appear to be in conflict, they must be

construed in a harmonious way. When determining legislative intent, neither clause should be viewed in isolation or taken out of context.

The principles that Wisconsin courts have applied when deciding whether state law claims are preempted by federal law provide guidance for resolution of this dispute over the appropriate scope of preemption intended by the legislature in Wis. Stat. § 134.90. Once again, the court of appeals got it right.

II. PREEMPTION IS CONSISTENT WITH WISCONSIN'S ALREADY EXISTING LAW WHICH PROVIDES THAT ABSENT A VALID RESTRICTIVE EMPLOYMENT COVENANT, A FORMER EMPLOYEE DOES NO WRONG BY USING A FORMER EMPLOYER'S ALLEGEDLY CONFIDENTIAL INFORMATION IN COMPETITION AGAINST THE FORMER EMPLOYER UNLESS THE CONFIDENTIAL INFORMATION RISES TO THE LEVEL OF A TRADE SECRET.

Burbank seeks to protect its Customer Information based on Restatement (Second) of Agency §396 providing that a former employee breaches his or her duty of loyalty to his or her former employer by using the former employer's trade secret or "confidential" information in post-employment competition against the former employer. Interestingly, we find no Wisconsin court citing §396 of the 1958 Restatement in support of a breach of loyalty claim such as Burbank's.

The reason for this is clear. Wisconsin law already provides that customer list information, if not rising to the level of a trade secret, is only protected with a valid restrictive employment covenant, such as a non-disclosure agreement.[6]

In *Gary Van Zeeland Talent, Inc. v. Sandas*, 84 Wis. 2d 202, 205, 267 N.W.2d 242 (1978)[7], Van Zeeland's former employee left with the talent agency's customer list to compete against Van Zeeland. In *Van Zeeland* it was undisputed that the former employee physically took the customer list "without the consent of Van Zeeland" and

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[6] WUTSA does not preempt contractual remedies regardless of whether they are based on the misappropriation of a trade secret (such as the breach of a nondisclosure agreement). See §134.90(6)(b)1.

[7] Although WUTSA became effective in Wisconsin in 1986, the pre-WUTSA definition of a trade secret was the basic source of the definition of "trade secret" in WUTSA, and, therefore, pre-WUTSA cases can be helpful in providing guidance when applying WUTSA. *Minuteman, Inc. v. L.D. Alexander,* 147 Wis. 2d 842, 853, 434 N.W.2d 773 (1989).

"thereafter went into competition with Van Zeeland" and caused him damage. *Id.* at 220-221.

Van Zeeland argued that even if its customer list was not a trade secret, it should still be afforded protection under the misappropriation doctrine. Rejecting this argument, the Wisconsin Supreme Court stated:

> [C]ustomer lists are at the very periphery of the law of unfair competition, because legal protection does not provide incentives to compile lists, because they are developed in the normal course of business anyway. The entire rationale of providing protection to a customer list depends upon the basic philosophy that social welfare is enhanced by placing restraints on trade that will encourage the creativity by which processes and products will ultimately inure to the general welfare. *While the prevention of employee disloyalty is a worthwhile social objective, because of the countervailing policy against restraint of trade, the loyalty of an employee will be enforced by law only under the unusual circumstance where a "trade secret" is involved.*

Van Zeeland, 84 Wis. 2d at 221-22 (emphasis added).

Further, the court stated:

> ... so long as a departing employee takes with him no more than his experience and intellectual development that has ensued while being trained by another, and no trade secrets or processes are wrongfully appropriated, the law affords no recourse.

Id. at 214 (citation omitted)(see also, *Composite Marine Propellers v. Van Der Woude*, 962 F.2d 1263, 1265 (7th Cir. 1992) in which the United States Court of Appeals for the Seventh Circuit, analyzing Illinois' UTSA, held that the statute "abolishe[s] all common law theories of misuse of confidential information .... Unless defendants misappropriated a (statutory) trade secret, they did no legal wrong.").

And:

> While a declaration that the customer list is of value may have some persuasiveness in showing that the employer attempted to keep the list a secret, it is the public's right to have reasonable competition, irrespective of what self-serving declarations the employer may insist upon. Merely stating or having the employee acknowledge that a customer list is secret

> does not make it a trade secret entitled to be protected by the law in derogation of freedom of commerce and trade.

Van Zeeland, 84 Wis. 2d at 218-219.

In *Corroon & Black-Rutters & Roberts, Inc. v. Hosch*, 109 Wis. 2d 290, 291-292, 325 N.W.2d 883 (1982), the Wisconsin Supreme Court held that detailed customer information, including client names, numbers, addresses, amounts of insurance coverage, renewal dates, etc., which the court assumed in its analysis were taken and used by the former employee against his former employer, did not rise to the level of a trade secret. Further, the court pointed out that in the absence of a covenant not to compete, Corroon & Black's remedy turns on whether the customer information is a trade secret. *Id.* at 293. And, if it is not, "the law affords no recourse." *Id. citing Van Zeeland*, 84 Wis. 2d at 214.

Restrictive post-employment covenants, such as those found in non-compete and non-disclosure agreements, are not enforceable in Wisconsin unless they meet the requirements of Wis. §103.465, Stats., which provides:

> **Restrictive Covenants in Employment Contracts.** A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal. Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

In *Tatge v. Chambers & Owen, Inc.*, 219 Wis. 2d 99, 112, 579 N.W.2d 217, 222 (1999), this court held that §103.465 applies to agreements prohibiting employees from using an employer's "confidential" customer information:

> As in *Van Zeeland*, it is clear that Chambers & Owen seeks to restrain competition through use of the non-disclosure provision. It seeks to shield its customer data, programs, and business practices from competitors'

> eyes because it "represents an asset of substantial value." This is the essence of a trade restraint; it would be an exercise in semantics to overlook Wis. Stat. § 103.465 merely because paragraph 1 of the agreement is not labeled a "covenant not to compete."

The fact that Wisconsin law has not afforded protection to customer list information unless it is either a trade secret or protected by a valid restrictive employment covenant strongly suggest that the preemption provision in Wis. Stat. § 134.90(6) should preempt common law theories seeking to protect such confidential customer information based on breach of fiduciary duty theories, regardless of whether it rises to the level of a trade secret.

This is further supported by the Comments to the 1985 Act (WUTSA), which indicate the intent to preempt the various fiduciary duty claims available in common law to pursue those who misappropriate confidential information. The following is an explanation regarding the original UTSA

as enacted by the Conference of Commissioners on Uniform State Laws:

> Like traditional trade secret law the Uniform Act contains general concepts. The contribution of the Uniform Act is substitution of unitary definitions of trade secret and trade secret misappropriation and a single statute of limitations for the various property, quasi-contractual, and *violation of fiduciary relationship theories* of noncontractual liability utilized at common law.

Wisconsin Stat.Ann. § 134.90, Comments–1985 Wis. Act 236 (emphasis added).

Accordingly, the court of appeals' holding that Burbank's breach of fiduciary duty claim is preempted by WUTSA should be upheld.

III. BURBANK'S POSITION WOULD RESULT IN BAD PUBLIC POLICY.

Burbank's arguments would result in bad public policy for Wisconsin. First, in the absence of a valid non-disclosure agreement, if Burbank's breach of fiduciary duty claim is not

preempted, then whenever an employer sues a former employee for improper use of its allegedly "confidential" information, the parties will be forced to fight over whether the information rises to the level of a trade secret, which, if so found, would preempt the claim. As stated earlier, this interpretation makes little sense because it renders the preemption provision meaningless.

Moreover, Burbank's position would frustrate Wisconsin's well-established law clearly providing that in order to protect the free movement of trade and labor in our marketplace, an employer has no recourse for protecting confidential information unless it is a trade secret or protected by a valid restrictive covenant. *See, Corroon & Black-Rutters & Roberts, Inc,* and *Van Zeeland, supra.*

Wisconsin apparently has a two step process for protecting a business's customer list information. First, it

determines if it is a trade secret. If not, the employer is out of luck unless it has a restrictive covenant, such as a non-disclosure agreement. But even then, the confidential information is only protected if the agreement meets the rigorous requirements set forth in §103.465 for restrictive employment covenants.

If Burbank's position becomes the law, then employers can simply throw a nondisclosure clause in their employee handbook, ask their employees to acknowledge that their customer lists are considered confidential, and suddenly they would have, in essence, an enforceable restrictive post-employment covenant. Such a result would be absurd, effectively sidestepping the applicability of §103.465. Yet, this is what Burbank is asking for, because it does not have a nondisclosure agreement with Sokolowski, as it admits.

Preemption of Burbank's fiduciary duty claim by WUTSA avoids the result of needless litigation, reinforces legal certainty and consistency in Wisconsin law, and preserves the application and underlying policy of §103.465.

CONCLUSION

The court of appeals correctly interpreted the preemption provision of Wis. Stat. § 134.90(6), and its decision should be upheld.

Dated this 29th day of June, 2005.

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CERTIFICATION

I certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), Stats., for a brief produced using the following font:

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Dated this 29th day of June, 2005.

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SUPREME COURT OF WISCONSIN

BURBANK GREASE SERVICES, LLC,

Plaintiff-Appellant-Petitioner,

v.

Appeal No. 2004AP468

LARRY SOKOLOWSKI;
UNITED GREASE L.L.C.,
and UNITED LIQUID WASTE
RECYCLING, INC.,

Defendants-Respondents.

REPLY BRIEF OF
PLAINTIFF-APPELLANT-PETITIONER,
BURBANK GREASE SERVICES, LLC

Review of Court of Appeals District IV,
Appeal No. 2004AP468

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ARGUMENT

I. RESPONDENTS HAVE NOT PROVIDED THIS COURT WITH ANY REASON TO IGNORE ITS OWN STATUTORY CONSTRUCTION RULES AND PREEMPT BURBANK'S COMMON LAW CAUSES OF ACTION WHICH ARE NOT BASED UPON MISAPPROPRIATION OF A TRADE SECRET.

A. Respondents advance no persuasive legal arguments.

Pages 13 through 21 of Burbank's opening brief provides a thorough analysis of Wisconsin's statutory interpretation rules and applies them to the facts of this case. Respondents do not directly refute or contradict the logic or analysis set forth at those pages. Failure to respond to arguments raised by Burbank amounts to an admission that they are sound. *State ex rel. Blank v. Gramling*, 219 Wis. 196, 199, 262 N.W. 614, 615 (1935).

1. Sokolowski provides no statutory interpretation analysis.

Sokolowski's only argument addressing Burbank's statutory interpretation analysis is that this Court has a history of applying case law and other extrinsic sources even where the plain meaning of the statute is not ambiguous.

(Sokolowski Brief, p. 12.) Sokolowski, however, offers no justification for resorting to any extrinsic evidence in this case. Moreover, none of the cases cited by Sokolowski is as recently decided as *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110.

In *Kalal*, this Court clarified that statutory interpretation begins with an examination of the language used in the statute, and if the meaning of the statute is plain, the inquiry stops and there is no need to consult extrinsic sources of interpretation. *Kalal*, 2004 WI at ¶¶45-46, 271 Wis. 2d at 663, 681 N.W.2d at 124. Sokolowski's citation to earlier cases in which extrinsic evidence may have been utilized is nothing more than a result-oriented analysis designed to justify the improper statutory interpretation conducted by the Court of Appeals. The Court of Appeals did not engage in any meaningful statutory interpretation analysis, and neither does Sokolowski.

2. The comments to 1985 Act 236 support Burbank.

Both Sokolowski and the United entities maintain that the comments to 1985 Act 236 support the Court of Appeals' incorrect interpretation of Wis. Stat. §134.90(6). (Sokolowski Brief, p. 13, United Brief, pp. 43-44.) Neither Sokolowski nor the United entities, however, provide the proper or full context within which the comments to 1985 Act 236 were taken. A review of the full context shows the flaw in Respondents' logic and argument.

First, the text of the portion of the comment cited by Respondents does not include **any** language that indicates the legislature intended to preempt any information not rising to the level of a trade secret. This comment merely indicates the legislature's intent to unify the definition of a **trade secret** and to provide a single statute of limitations for all trade secret claims.

Second, the passage cited by Respondents actually is a quote contained in the Prefatory Note of 1985 Act 236 which is taken from the National Conference of Commissioners on Uniform State Laws' ("NCCUSL")

Preamble to the UTSA. The full context of the comment reads:

> According to the commissioners' prefatory note to the act, the act codifies the basic principles of **common law trade secret protection** in a manner which preserves its essential distinction from patent law. The prefatory note states:
>
> *"Like traditional trade secret law, the Uniform Act contains general concepts. The contribution of the Uniform Act is substitution of unitary definitions of trade secret and trade secret misappropriation and a single statute of limitations for the various property, quasi-contractual, and violation of fiduciary relationship theories of noncontractual liability utilized at common law."*
>
> The act, according to the commissioners' comments, also codifies the results of the better reasoned cases concerning the remedies for **trade secret** misappropriation.

1985 Act 236, Prefatory Note (quote Respondents cited in italics) (emphasis added). Based on this Note, the Wisconsin legislature's focus was on distinguishing trade secret protection from patent law protection, and on unifying common law only on the issue of **trade secrets**, not on which cases to preempt. Use of this Note, therefore, does not support Respondents' position.

A more thorough review of the legislative history shows that the NCCUSL intended the **opposite** result of that argued by Respondents. In comments to Section 7 of the UTSA, the Commission stated:

> [t]his Act does not deal with criminal remedies for trade secret misappropriation and **is not a comprehensive statement of civil remedies**. . . . The Act also does not apply to a duty imposed by law that is not dependent upon the existence of competitively significant secret information, **like an agent's duty of loyalty to his or her principal**.

Uniform Trade Secrets Act with 1985 Amendments, §7, cmt. (NCCUSL 1985)(emphasis added).

Likewise, the language of Wis. Stat. §134.90(6)(b)2 shows that the WUTSA does not preempt civil remedies not based on the misappropriation of trade secrets. The only comment the Wisconsin Legislature had with respect to Wis. Stat. §134.90(6) is that "Subsection (6) is based on section 7 of the act." 1985 Act 236. Therefore, absent direct contradictory discussion from the Wisconsin legislature on this issue, there is nothing in the legislative history to indicate the legislature intended a different result than that advocated by Burbank.

3. Burbank's position is based on law, not trickery.

The United entities maintain that if this Court follows the logic of Burbank, Plaintiffs will be smart enough not to use the "magic words" "trade secrets" in their complaint, and that this "simple trick of semantics" will defeat the goal of the uniformity, causing Plaintiffs to operate outside the statutory scheme. (United Brief at pp. 24-25.) In reality, however, the only "magic words" being used are those contained in the definition of "trade secret" as set forth by the legislature in Wis. Stat. §134.90(1)(c).

Moreover, the only "trick of semantics" that is being perpetrated in this case is the Court of Appeals' ability to use a narrow statutory definition to decide what information constitutes a "trade secret" under Wis. Stat. §134.90 so that it is entitled to special protection, but then magically broadening that definition of "trade secret"--to include information that does not normally meet the statutory definition--when deciding which non-trade secret-based claims should be preempted by the statute. This meddlesome conduct by the Court of Appeals in rewriting

the statute clearly violates the statutory interpretation maxim that specifically defined terms of a statute should be given their technical or special definitional meaning. *Kalal*, 2004 WI 58, ¶45, 271 Wis. 2d at 663, 681 N.W.2d at 124.

4. Burbank's position will not lead to absurd results or render the preemption clause meaningless.

United further contends that the implications of Burbank's argument would lead to "illogical or absurd results," but yet does not identify what "illogical or absurd results" would ensue. Regardless of whether this Court follows Burbank's interpretation or affirms the decision of the Court of Appeals, whether information is a "trade secret" will always be a threshold question that must first be addressed by the court or a jury.

Juries and courts are required to make such threshold decisions in nearly every type of case. For example, in a personal injury case in which the defendant is contesting liability, a plaintiff is still allowed to provide evidence of damages. In a contract case, a plaintiff is not precluded from arguing for a specific remedy even if the very existence of the contract has not yet been determined.

Similarly, Burbank should be allowed to plead trade secret protection and common law non-trade secret protection. A plaintiff is allowed to plead in the alternative to preserve otherwise conflicting theories of recovery. *See* Wis. Stat. §802.05(1m).

Sokolowski relies on a rationale outlined by the Northern District of Illinois in *Thomas & Betts Corp. v. Panduit Corp.*, 108 F. Supp. 2d 968 (N.D. Ill. 2000), that Burbank's interpretation of the preemption clause would render it meaningless. The logic of Sokolowski and the Court of the Northern District of Illinois is flawed. The Court in *Thomas & Betts* contended that the preemption clause would be rendered meaningless if state law claims could be maintained until final determination has been made with respect to whether the confidential information rose to the level of a trade secret. Because such a threshold decision must be made under both the Court of Appeals' decision and Burbank's interpretation, the provision has meaning regardless.

5. Burbank's position does consider cases from other jurisdictions.

The United entities argue that Burbank's interpretation would render Wis. Stat. §134.90(7) meaningless. That section of the statute asks that Wisconsin's version of the UTSA be interpreted consistently with those states enacting similar laws. While such a goal is noble, given the conflicting interpretations of the preemption provision among the various states, it would be impossible for this Court to achieve uniformity. The Court of Appeals, citing cases on both sides, recognized the impossibility of uniformity in its decision. *Burbank*, 2005 WI App. 28 at ¶¶33-36. Consequently, Burbank's interpretation of Wis. Stat. §134.90(6) does not fly in the face of or render meaningless Wis. Stat. §134.90(7).

6. *Boyle* is inapplicable.

Citing *Boyle v. Chrysler Corp.*, 177 Wis. 2d 207, 501 N.W.2d 865 (Ct. App. 1993), the United entities argue that it would be appropriate for this Court to interpret the statutory term "trade secret" to include "closely related concepts if the context warrants." (United Brief, p. 34.)

United argues that if Wis. Stat. §134.90(6) preempts common law claims based on trade secrets, then it logically (but implicitly) applies "with equal force to claims that are mistakenly alleged to be trade secrets." However, there was no mistake in Burbank alleging that its information was a trade secret. Burbank had a right to have that issue determined by the court. Once the court determined that Burbank's information did not rise to the level of a protectable trade secret, however, Burbank's claims were taken out of the purview of Wis. Stat. §134.90. Consequently, the preemption clause no longer applied. It is not logical, therefore, to apply the preemption clause with equal force to claims that do not rise to the level of a statutorily defined "trade secret." In fact, such a claim not only defies logic, but it also flies in the face of Wisconsin's statutory interpretation rules. *See Kalal, supra.*

In addition, language from the *Boyle* decision actually supports Burbank's decision. In *Boyle*, the court found the savings clause of 15 U.S.C. §1397(k) (1982) preserved only those common law liability claims that did not conflict with the standards that Congress enacted. *Boyle*, 177 Wis. 2d at

218, 501 N.W.2d at 869. If Burbank were arguing that it was not seeking trade secret protection under the statute but just under common law, then its case would be preempted. However, because the lower courts have ruled that Burbank's information does not rise to the level of a trade secret, Burbank was prevented from seeking statutory trade secret protection, and was left with common law non-trade secret claims. Those claims cannot possibly be preempted.

B. Public policy should not support a deliberate breach of trust and confidence.

In pre-WUTSA cases, this Court enunciated a policy consideration on which all Respondents rely. In *Gary Van Zeeland Talent, Inc. v. Sandas*, 84 Wis. 2d 202, 267 N.W.2d 242 (1978), this Court stated that "so long as a departing employee takes with him no more than his experience and intellectual development that has ensued while being trained by another, and no trade secrets or processes are wrongfully appropriated, the law affords no recourse." *Id.*, 84 Wis. 2d at 214, 267 N.W.2d at 248. Neither Sokolowski nor the United entities can possibly

contend that Sokolowski took **only** his "experience and intellectual development" to start his new competing business. Had that been all Sokolowski left with, this case would not have been filed. Sokolowski's experience and intellectual development should have allowed him the opportunity to compile a customer list, determine the prices to charge these customers, market his services, arrange for logistics, and operate a business. This type of legitimate competition should be encouraged.

Unfortunately, Sokolowski did not rely on his experience and intellectual development. Rather, he relied upon confidential business information obtained from Burbank through a relationship of trust that Sokolowski knew to be valuable to Burbank or a competitor. Burbank's confidential information extends to more than just a simple Christmas card name list that was at issue in *Van Zeeland*. Sokolowski had Burbank's mammoth customer list, which included name, address, phone number, contact person, type of service utilized, size of grease trap and price charged. (R.38, A-Ap. 260; R.6, A-Ap. 277-78.)

Sokolowski also had an industrial account spreadsheet, which was not simply just a pricing formula as Sokolowski argues. Rather, the information contained on the spreadsheet within the formula included the customer's grease yield percentage (after processing by Burbank) and Burbank's processing costs--information which no competitor of Burbank could possess and could not be ascertainable by any proper means. (R.38, A-Ap. 262.)

Sokolowski also had a route driver spreadsheet which contained data showing the revenue generated by Burbank per route truck per day. (R.38, A-Ap. 272.) Again, this information was not readily available through proper means. It could be easily utilized by somebody with experience and skill in the industry to immediately determine which accounts were most profitable and to focus efforts on soliciting only those accounts. It is this type of unfair competition that the Court of Appeals protects in its decision that tips the balance too far in favor of employee mobility and against which employers should be afforded protection.

This case is not one in which Burbank seeks a restrictive covenant through common law either, despite the

argument made by Sokolowski. (Sokolowski Brief, p. 13.) Burbank is not saying Sokolowski cannot compete. Burbank merely wishes that Sokolowski simply used only his experience and intellectual development to do so, not Burbank's confidential information. Rather than rely on his experience and intellectual development, Sokolowski took the shortcut of using Burbank's confidential information to achieve his end. This conduct should not be encouraged. Yet, the decision of the Court of Appeals does exactly that.

Van Zeeland was a pre-WUTSA case which relied on another pre-WUTSA case, *Abbott Laboratories v. Norse Chemical Corporation*, 33 Wis. 2d 445, 147 N.W.2d 529 (1967). In *Abbott*, this Court adopted the Restatement position on trade secrets, and indicated that it gave the proper balance between competing policy considerations of employee mobility and protection of employer confidential information. *Abbott*, 33 Wis. 2d at 456, 147 N.W.2d at 534. However, a lot has changed since 1967. What constitutes a "trade secret" now is specifically defined by statute. The WUTSA specifically excludes other common law causes of action based upon misappropriation of a trade

secret. Modern technology has made misappropriation of information relatively easy. It is time, therefore, to revisit pre-WUTSA policy considerations and close the loophole created by the Court of Appeals' decision in this case.

Respondents also misplace reliance on another pre-WUTSA case, *Corroon & Black-Rutters & Roberts, Inc. v. Hosch*, 109 Wis. 2d 290, 325 N.W.2d 883 (1982), to argue that customer lists should not be entitled to trade secret protection, and that confidential information that does not rise to the level of a trade secret should not be protected in order to guarantee the free movement of trade and labor in the marketplace. However, this case is not simply about a customer list. Moreover, *Corroon & Black* lost its precedential value for the issue of what constitutes a trade secret by this Court's decision in *Minuteman, Inc. v. L.D. Alexander*, 147 Wis. 2d 842, 434 N.W.2d 773 (1989). Because there was no preemption provision prior to Wis. Stat. §134.90, *Corroon* is not appropriate to guide this Court on how to interpret Wis. Stat. §134.90(6).

II. INTERPRETING WIS. STAT. §943.70(2)(a)6 UTILIZING THE SAME STATUTORY CONSTRUCTION RULES OUTLINED ABOVE REVEALS THAT SOKOLOWSKI COMMITTED A COMPUTER CRIME.

Sokolowski contends the legislature could have chosen different words to express the position Burbank has taken. Because the legislature did not, however, this Court must look at the language the legislature did choose, give effect to each and every provision, and avoid an absurd result in its construction. *Kalal*, 2004 WI 58, ¶46, 271 Wis. 2d at 663, 681 N.W.2d at 124. The absurd result that should be avoided in this case is for it to be a crime to have Sokolowski give somebody information to access the computer data Sokolowski possessed, to have it be a crime for Sokolowski to download this information and email it to an unauthorized party, to have it be a crime for Sokolowski to "hack" into the system, view the data and disclose it to others, but not have it be a crime for Sokolowski to print the data (because he had authority to do so), and later disclose it to anyone. This scenario provides an example of an unfortunate loophole in the statute which must be closed.

To read the statute any other way would lead to an absurd result that should be avoided.

CONCLUSION

The Court of Appeals' decision in this case leaves two gaping holes in Wisconsin law and swings the pendulum too far toward worker mobility and against employer protections. The legal holes were the result of improper statutory interpretation. Proper interpretation by following the rules set down by this Court in *Kalal* will lead to the clear decision that the Court of Appeals' decision should be reversed and remanded to the trial court for further proceedings.

Respectfully submitted this 12th day of July, 2005.

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CERTIFICATION

I certify that this Reply Brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and §809.62(4), for a Reply Brief produced with CG Times, a proportional serif font, with a 13 point body text. The length of this brief is 2,909 words, as calculated by the automatic word count feature of Microsoft® Word.

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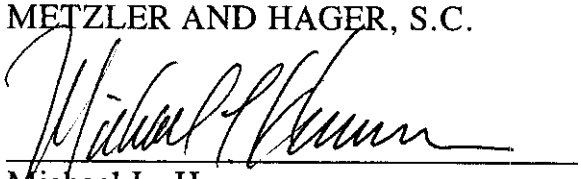
By: 

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